

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THERANOS, INC., ET AL) CV-11-5236-PSG
)
) SAN JOSE, CALIFORNIA
PLAINTIFF,)
) MARCH 5, 2014
VS.)
) PAGES 1-84
RUISZ TECHNOLOGIES, LTD, ET AL,)
)
DEFENDANT.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL S. GREWAL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: BOIES SCHILLER FLEXNER, LLP
BY: MICHAEL UNDERHILL
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WASHINGTON, DC 20015

FOR THE DEFENDANT: PRO SE
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED WITH COMPUTER.

APPEARANCES CONTINUED ON THE NEXT PAGE

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CERTIFICATE NUMBER 13185

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24
25

1 SAN JOSE, CALIFORNIA

MARCH 5, 2014

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS
4 WERE HELD:)

5 THE CLERK: CALLING THERANOS, INC., ET AL. VERSUS
6 FUISZ PHARMA LLC, ET AL. CASE CV -11-5236-PSG.

7 MATTER ON FOR PRETRIAL CONFERENCE AND HEARING ON MOTIONS.

8 COUNSEL, PLEASE STATE YOUR APPEARANCES.

9 MR. BOIES: YOUR HONOR, THIS IS DAVID BOIES, BOIES,
10 SCHILLER & FLEXNER. I REPRESENT THERANOS.

11 I WOULD LIKE TO THANK THE COURT FOR PERMITTING ME TO
12 PARTICIPATE BY TELEPHONE. I DON'T ORDINARILY REQUEST THIS, BUT
13 I HAD A PREVIOUSLY SCHEDULED ARGUMENT IN THE UNITED STATES
14 SUPREME COURT THIS MORNING.

15 THE COURT: GOOD AFTERNOON, MR. BOIES.

16 MR. UNDERHILL: MIKE UNDERHILL WITH THE SAME LAW
17 FIRM.

18 WITH ME ARE MY COLLEAGUES MICHAEL JAY, WILLIAM MARSILLO AND
19 MEREDITH DEARBORN.

20 THE COURT: GOOD AFTERNOON TO EACH OF YOU AS WELL.

21 MR. JOE FUISZ: JOE FUISZ, PRO SE.

22 MR. RICHARD FUISZ: AND RICHARD FUISZ, PRO SE.

23 THE COURT: MR. FUISZ, DOCTOR FUISZ, GOOD AFTERNOON.
24 WELCOME TO EACH OF YOU AS WELL.

25 IS ANYONE ELSE ON THE PHONE? I THOUGHT MS. ANDERSON WAS

1 ALSO GOING TO JOIN US. MS. ANDERSON, ARE YOU ON?

2 THE OPERATOR: PARDON THE INTERRUPTION, YOUR HONOR.

3 THIS IS THE OPERATOR.

4 MS. ANDERSON IS CONNECTED WITH AN OPEN MICROPHONE.

5 MS. ANDERSON: I'M SORRY, YOUR HONOR. I SET THE MUTE
6 BUTTON. MY APOLOGIES.

7 I AM PRESENT AND THANK YOU FOR ALLOWING ME TO APPEAR BY
8 TELEPHONE.

9 THE COURT: NO APOLOGY NECESSARY, MS. ANDERSON. GOOD
10 AFTERNOON AND WELCOME TO YOU AS WELL.

11 I WANT TO BEGIN BY LAYING OUT MY THOUGHTS ABOUT HOW WE
12 CAN MAKE THE BEST USE OF OUR TIME THIS AFTERNOON. OBVIOUSLY WE
13 HAVE A NUMBER OF ISSUES TO COVER.

14 I WOULD LIKE TO FIRST OF ALL SAY THAT I'M GOING TO
15 RESERVE RESOLVING ANY DISPUTES REGARDING THE PROPOSED FINDINGS
16 AND CONCLUSIONS OF LAW AND JURY INSTRUCTIONS FOR A LATER DATE
17 AND TIME. ORDINARILY THOSE TYPES OF DISPUTES ARE THINGS I
18 ADDRESS AND DEAL WITH DURING THE TRIAL AT A CHARGING CONFERENCE
19 OR AT SOME POINT EARLIER THAN THAT.

20 BECAUSE WE HAVE SO LITTLE TIME TODAY AND A NUMBER OF
21 MOTIONS TO COVER, I WOULD REALLY LIKE TO FOCUS ON THE MOTION IN
22 LIMINE AS WELL AS THE MOTION FOR ADVERSE INFERENCE.

23 I FULLY APPRECIATE THAT WE ALSO HAVE A MOTION TO DISMISS
24 THAT'S BEEN PENDING AS WELL AS A MOTION REGARDING THE AEO RE
25 DESIGNATION.

1 SO DAUBERT, MIL, MOTION FOR ADVERSE INFERENCE, AS WELL AS
2 THE AEO RE DESIGNATION MOTION, THOSE ARE THE ITEMS I WOULD LIKE
3 TO MOST CONCENTRATE ON THIS AFTERNOON.

4 SO WITH THAT, IF I MIGHT PROPOSE AN ORDER, I WOULD LIKE
5 TO START WITH THE FUISZ DEFENDANTS MOTION IN LIMINE NUMBER ONE
6 WHICH HAS TO DO WITH SECTION 282 COMPLIANCE.

7 I WILL JUST SAY BEFORE I TURN THINGS OVER TO MR. FUISZ,
8 THAT I HAVE READ THE PAPERS SO THERE'S NO NEED TO REHASH THE
9 ENTIRETY OF YOUR ARGUMENT.

10 I WOULD REALLY LIKE TO FOCUS ON THE MATTERS THAT ARE IN
11 DISPUTE. PARTICULARLY MATTERS THAT THE OPPOSING PARTY RAISED
12 IN THE OPPOSITION THAT PERHAPS THE MOVING PARTY DID NOT HAVE A
13 CHANCE TO ADDRESS IN ITS PAPERS.

14 WITH THAT MR. FUISZ, I WILL TURN THINGS OVER TO YOU.

15 THE COURT: IF YOU COULD STAND AT THE PODIUM.

16 MR. JOE FUISZ: JUST REALLY QUICKLY YOUR HONOR,
17 BECAUSE I KNOW WE ARE VERY PRESSED FOR TIME, I THINK THAT THE
18 282 MOTION AND THE PROTECTIONS IMPLIED THEREBY FOR DEFENDANT IN
19 A PATENT MATTER ARE TIED TOGETHER FOR ME WITH A LOT OF
20 CONFUSION IN TERMS OF WHAT PLAINTIFFS HAVE REPRESENTED IN TERMS
21 OF WHO THE INVENTORS ARE.

22 IN THE SECOND AMENDED COMPLAINT ON PARAGRAPH 88, THEY
23 IDENTIFY MS. HOLMES AND OR MR. KEMP. IN THE ORIGINAL JURY
24 INSTRUCTIONS WE GOT FROM THE PLAINTIFFS -- WELL ACTUALLY, LET
25 ME MENTION ONE OTHER THING. THERE'S A BIT OF AN ODD THING, THE

1 SECOND AMENDED COMPLAINT BECAUSE IT DOESN'T SEEM TO CLAIM
2 INVENTORSHIP OF CLAIM 17. THEY'VE GOT A LIST OF CLAIMS AND
3 THEY OMIT 17 FROM THAT LIST. AND I APOLOGIZE, I DON'T HAVE THE
4 PARAGRAPH NUMBER TO GIVE YOU.

5 THE INITIAL JURY INSTRUCTIONS WE GOT IDENTIFY ONLY
6 MS. HOLMES AND NOT MR. KEMP WHICH IS STRANGE BECAUSE HE SENT AN
7 E-MAIL SAYING THIS IS A TYPO. WE HAD A CONFERENCE CALL AND I
8 HAD A DIFFERENT UNDERSTANDING THAN MR. UNDERHILL ABOUT WHAT WAS
9 COMMUNICATED. DON'T WANT TO HAVE A HE SAID SHE SAID ABOUT WHAT
10 WAS SAID ON THAT CALL.

11 I SENT A FOLLOW UP E-MAIL AGAIN ASKING FOR THE
12 CONFIRMATION, THAT WAS THEIR INTENTION, AND THE ONLY RESPONSE I
13 GOT FROM THEM WAS AFTER WE WENT AHEAD AND FILED OUR 256 CAUSE
14 OF ACTION TO DISMISS.

15 THE OTHER THING I WOULD LIKE TO BRING THE COURT'S
16 ATTENTION IS THAT WHEN THERANOS FILED CLAIMS BEFORE THE PATENT
17 OFFICE ON NOVEMBER 2ND, 2011, THEY ACTUALLY IDENTIFIED
18 MS. HOLMES, MR. -- I'M MESSING THE NAMES UP, BUT HOLMES,
19 HOWARD, WANG, GIBBONS, KEMP AND SZE.

20 SO YOU KNOW, IT SEEMS TO ME IN RECOGNIZING THAT THE 282
21 REMEDY THAT WE HAVE ASKED FOR IS EXTREME, I UNDERSTAND THAT,
22 BUT WHEN I SORT OF LOOK AT THE COURSE, IT SEEMS TO ME THE VERY
23 NOTION OF 282 IS TO PROTECT THE DEFENDANTS SO WE KNOW PRECISELY
24 WHAT IT IS WE ARE SHOOTING AT IN TERMS OF WHO INVENTED WHAT
25 CLAIM.

1 SO WHAT I WOULD RESPECTFULLY ASK THE COURT AT A VERY
2 MINIMUM IS THAT THE PLAINTIFFS IDENTIFY FOR US ON A CLAIM BY
3 CLAIM BASIS WHO THEY ARE ACTUALLY ASSERTING WHO THE INVENTOR
4 IS. BECAUSE I WOULD SUBMIT TO YOU FROM THE THINGS I'VE SEEN I
5 ENUMERATED FOR YOU IT'S UNCLEAR

6 THE COURT: ALL RIGHT.

7 I MAY HAVE A FEW FURTHER QUESTIONS FOR MR. FUISZ.

8 MR. UNDERHILL, DO YOU WANT TO RESPOND?

9 MR. UNDERHILL: YES, YOUR HONOR.

10 TO BE PERFECTLY CLEAR, AND I THINK WE HAVE BEEN CLEAR
11 THROUGHOUT THE CASE, WE ARE ALLEGING THAT ELIZABETH HOLMES AND
12 TIM KEMP SHOULD BE ADDED TO THE PATENT AND THE FUISZS SHOULD BE
13 REMOVED.

14 NOW WHAT I DID SAY IN THE PHONE CALL AND WHAT WE WILL DO
15 AT TRIAL IS WE WILL EMPHASIZE THE INVENTORSHIP CLAIM OF
16 MS. HOLMES.

17 I MEAN, OUR VIEW OF THE WORLD IS THAT IS A STRONGER CLAIM
18 AND THAT'S WHAT WE PLAN TO EMPHASIZE, BUT WE CERTAINLY HAVEN'T
19 CHANGED OUR INVENTORSHIP CLAIM.

20 THE COURT: ALL RIGHT.

21 WELL, I APPRECIATE THAT CLARIFICATION BECAUSE IT MAY
22 STREAMLINE SOME OF THE ADDITIONAL MOTIONS THAT WE ARE GOING TO
23 ADDRESS.

24 ON THE 282 ISSUE WHICH IS THE MOTION IN LIMINE NUMBER
25 ONE, I BELIEVE FROM THE DEFENDANTS, I THOUGHT THE ISSUE WAS

1 SIMPLY WHETHER OR NOT THE LOCAL RULE DISCLOSURES SATISFIED THE
2 OBLIGATION UNDER THE STATUTE TO PROVIDE FAIR NOTICE FOR
3 WHATEVER INVALIDITY REFERENCES ARE GOING TO BE RELIED UPON. I
4 DIDN'T HEAR MUCH DISCUSSION ON THAT POINT.

5 LET ME JUST, PERHAPS JUST OFFER MY THOUGHTS ON THIS SO WE
6 CAN FOCUS ON THE MORE SIGNIFICANT ISSUES HERE.

7 I'M GOING TO DENY THIS MOTION. I THINK THE DISCLOSURES
8 UNDER THE LOCAL RULES WERE SUFFICIENT TO PUT THE DEFENDANTS ON
9 NOTICE.

10 I THINK, HOWEVER, MR. UNDERHILL'S COMMENTS ARE GOING TO
11 BE HELPFUL IN DEALING WITH SOME OF THE OTHER MOTIONS THAT ARE
12 COMING UP. SO LET'S MOVE ON.

13 PERHAPS WE MIGHT TURN TO MOTION IN LIMINE NUMBER TWO FROM
14 THE DEFENDANTS WHICH HAS TO DO WITH EVIDENCE REGARDING
15 THERANOS'S INVENTORS, THE PRODUCTS, THE TEREX LITIGATION AND SO
16 ON AND SO FORTH.

17 MR. FUISZ, DO YOU WANT TO SPEAK TO THAT ONE AS WELL?

18 MR. JOE FUISZ: YES, YOUR HONOR.

19 OKAY. SO WE ARE ADDRESSING OUR SECOND MOTION IN LIMINE,
20 YOUR HONOR?

21 THE COURT: YES.

22 MR. JOE FUISZ: IF I COULD START WITH YEAH, EVIDENCE
23 OF THERANOS BUSINESS CUSTOMERS AND INVESTORS.

24 I THINK IT'S BEEN -- THIS IS MY UNDERSTANDING OF WHAT'S
25 ACTUALLY HAPPENED, HAVING READ THE REPLY, WHICH I THINK WAS

1 HELPFUL, THE REPLY OF THE PLAINTIFFS IN THE CASE.

2 I THINK AS A GENERAL MATTER, MAYBE NOT ALWAYS, AS A
3 GENERAL MATTER THE PLAINTIFFS HAVE ALLOWED US TO ASK QUESTIONS
4 ABOUT WHETHER WITNESSES ARE INVESTORS FROM A BIAS PERSPECTIVE.
5 BUT I THINK IT'S EQUALLY CLEAR THAT THEY HAVE WALLED OFF
6 INFORMATION ABOUT THERANOS'S BUSINESS, OFFERING CIRCULARS BEING
7 AN EXAMPLE.

8 THEY HAVE WALLED OFF INFORMATION ABOUT TOTAL INVESTMENT
9 IN THERANOS, AS ANOTHER EXAMPLE.

10 AND I WILL BE VERY CLEAR, I THINK WHAT CONCERNS MY DAD
11 AND MYSELF ABOUT THIS CASE, IS THE DISPUTE IN THIS CASE REALLY
12 INVOLVES WHAT THERANOS WAS DOING IN 2005 AND WHAT WE WERE DOING
13 IN 2005, AND TO SOME EXTENT FOR THE JURY, BOTH SIDES WANT TO
14 PRESENT NOTION OF CAPABILITIES OF 2005.

15 I THINK IT WOULD BE PREJUDICIAL TO US AND FRANKLY UNFAIR
16 SINCE THAT DISCOVERY HAS BEEN WALLED UP, IF PLAINTIFFS ARE ABLE
17 TO PRESENT SUBSEQUENT DISCUSSION OF INVESTMENTS IN ANALYZORS
18 AND THINGS THEY HAVE DONE, WHICH FRANKLY I THINK WOULD TEND TO
19 CONFUSE THE JURY, BUT HAVE NO BEARING ON WHAT THERANOS WAS
20 DOING IN 2005 AND WHAT THEIR CAPABILITIES WERE AT THAT TIME.

21 THE COURT: MR. FUISZ, ARE YOU SAYING THAT DURING
22 DISCOVERY YOU OR YOUR PRIOR COUNSEL TRIED TO GET INFORMATION
23 ABOUT THOSE ACTIVITIES AND WERE DENIED IN SOME WAY?

24 MR. JOE FUISZ: THAT'S MY UNDERSTANDING, YOUR HONOR.

25 I THINK IT'S -- I THINK IT'S REFLECTED IN PART IN THE

1 DISCOVERY HEARING ON MAY 16TH AND THE POSITIONS THAT WERE
2 TAKEN.

3 THE COURT: YOU CERTAINLY SPEAK TO THAT IN YOUR
4 PAPERS, SO I HAVE THAT.

5 MR. JOE FUISZ: I'M HAPPY TO REVIEW IT IF IT'S
6 HELPFUL.

7 THE COURT: NO, I UNDERSTAND THE POSITION YOU ARE
8 TAKING.

9 ALL RIGHT, I THINK I'VE GOT IT. I MAY HAVE A QUESTION OR
10 TWO, BUT I WILL GIVE YOU A CHANCE FOR REBUTTAL ONCE WE'VE HEARD
11 FROM MR. UNDERHILL.

12 MR. JOE FUISZ: THANK YOU.

13 THE COURT: THANK YOU.

14 MR. UNDERHILL?

15 MR. UNDERHILL: CERTAINLY, WE BELIEVE YOUR HONOR,
16 THAT WE NEED TO HAVE AN OPPORTUNITY TO TELL THE JURY WHO WE
17 ARE. WE CAN'T BE A, YOU KNOW, BLANKLESS, FACELESS COMPANY
18 CALLED THERANOS.

19 SO WE DO PLAN, AND WE HAVE MADE IT CLEAR THROUGHOUT THE
20 CASE INCLUDING IN COURT HEARINGS, YOUR HONOR, THAT WE DO INTEND
21 TO PUT ON BACKGROUND INFORMATION ABOUT THERANOS.

22 I CERTAINLY DISPUTE THE SUGGESTION THAT THE DEFENDANTS
23 HAVE NOT BEEN ALLOWED APPROPRIATE DISCOVERY. AND I THINK IN
24 CONTRAST, I BELIEVE TO THE MOVING PAPERS, WE HAVE TRIED TO
25 ACTUALLY PUT CHAPTER AND VERSE IN FRONT OF YOU OF THE DISCOVERY

1 THAT WAS PERMITTED.

2 WITH RESPECT TO CUSTOMERS, I BELIEVE DISCOVERY WAS WIDE
3 OPEN. I DO NOT THINK WE EVER LIMITED IT IN ANY WAY, SHAPE OR
4 FORM.

5 WE DID, AT PORTIONS OF THE DISCOVERY, LIMIT THE WHOLESALE
6 SHIPMENT OF BASICALLY THE COMPANY'S DOCUMENTS TO THE FUISZ'S.
7 WE WERE NOT WILLING TO TURN OVER, YOU KNOW, ALL OF OUR RESEARCH
8 DATA AND OUR PROTOTYPES AND, YOU KNOW, THE MYRIAD OF THINGS
9 THAT WERE ENCOMPASSED BY THE ORIGINAL DOCUMENT REQUEST. WE
10 DID, HOWEVER, PERMIT QUESTIONING IN DEPOSITIONS WHICH IS SET
11 OUT IN OUR OPPOSITION PAPERS.

12 I THINK THE FUISZ'S HAVE HAD MORE THAN A FAIR OPPORTUNITY
13 TO DISCOVER, I WOULD REPRESENT YOUR HONOR, MINIMAL LEVEL OF
14 DETAIL THAT WE PLAN TO GO IN AT TRIAL.

15 WE ARE NOT GOING TO GET INTO THE INNER WORKINGS OF THE
16 TECHNOLOGY OF OUR RECENTLY RELEASED PRODUCTS, FOR ONE THING
17 IT'S STILL TRADE SECRET. FOR ANOTHER THING, IT IS INDEED
18 IRRELEVANT TO THE CASE.

19 BUT WE HAVE TO BE ABLE TO EXPLAIN WHO WE AND ARE WHAT WE
20 HAVE BEEN DOING FOR THE LAST 11 YEARS.

21 THE COURT: DR. FUISZ, DO YOU WANT TO RESPOND?

22 MR. JOE FUISZ: I WOULD JUST LIKE TO SAY WITH ALL
23 RESPECT, I DON'T KNOW, APART FROM THE FACT THAT THERANOS HASN'T
24 DISAPPEARED, I DON'T KNOW WHY IT'S RELEVANT ANYTHING THAT
25 THERANOS HAS DONE AFTER 2006.

1 THE COURT: DR. FUISZ, GO AHEAD.

2 MR. RICHARD FUISZ: YOUR HONOR, WHAT I DON'T
3 UNDERSTAND IS THIS ALLEGED THEFT TOOK PLACE IN 2005 AND 2006.

4 I DO NOT SEE THE NECESSITY TO CONTINUALLY REFER TO CROWN
5 JEWELS IN TENS OF MILLIONS AND 20 MILLION AND 50 MILLION
6 INVESTMENT, WHEN THAT WAS NOT THE CASE IN 2005 AND 2006.

7 AND WE ARE OUT OF OUR ELEMENT HERE AND IN NORTHERN
8 CALIFORNIA. IT'S WELL KNOWN WHO THEIR INVESTORS ARE. IT'S
9 WELL KNOWN WHO THEY POLITICALLY TIE TO. IT'S WELL KNOWN WHO IS
10 ON THEIR BOARD. I KNOW THEIR BOARD MEMBERS. THEY KNOW VERY
11 LITTLE ABOUT THE COMPANY.

12 AND IT'S OBVIOUSLY WINDOW DRESSING TO IMPRESS THE PEOPLE
13 SITTING OVER THERE. AND I JUST DON'T THINK THAT'S RIGHT. THIS
14 CASE IS 2005, 2006.

15 THANK YOU, YOUR HONOR

16 THE COURT: ALL RIGHT.

17 MR. UNDERHILL: YOUR HONOR, WE DON'T PLAN TO REFER TO
18 CROWN JEWELS. WE DO BELIEVE THAT THE FUISZ'S WILL ATTEMPT TO
19 LEAVE THE IMPRESSION WITH THE JURY THAT THE '612 PATENT IS
20 NARROW OR AT LEAST WE WILL HEAR THE ARGUMENT THAT IT WAS WITHIN
21 THE ABILITY OF TWO INDIVIDUALS WITHOUT A LAB, WITHOUT
22 PROTOTYPES TO HAVE THOUGHT OF THE TECHNOLOGY.

23 WE DO NEED THE OPPORTUNITY TO MAKE IT CLEAR THAT WITH
24 RESPECT TO THERANOS, THIS WAS AN 11-YEAR EXERCISE THAT INVOLVED
25 A GREAT DEAL OF RESEARCH AND PROTOTYPES AND TESTING TO COME UP

1 WITH THE TECHNOLOGY.

2 THE COURT: GO AHEAD, MR. FUISZ.

3 MR. JOE FUISZ: MR. UNDERHILL HAS AN ARITHMETIC
4 PROBLEM. SUBTRACT 11 YEARS FROM 2005.

5 THE COURT: WHY DON'T YOU ADDRESS ME, MR. FUISZ.

6 MR. JOE FUISZ: SUBTRACT THE YEARS FROM 2005, WHERE
7 DOES THAT PUT YOU?

8 THERANOS WAS FORMED IN 2004 AS A CORPORATE ENTITY. THAT IS
9 NOT 11 YEARS. WE KEEP HEARING BRIEFING PAPER AFTER BRIEFING
10 PAPER. I'M TIRED OF HEARING TEN YEARS, IT HAS NOTHING TO DO
11 WITH THEIR PATENT.

12 MR. RICHARD FUISZ: YOUR HONOR, I AM TIRED OF HEARING
13 THAT WE HAVE NO CAPABILITIES, NO RESEARCH CAPABILITIES. I HAVE
14 122 PATENTS. WE HAVE LAB CAPABILITIES. WE COULD NOT HAVE
15 ACHIEVED WHAT WE ACHIEVED.

16 AS FAR AS THERANOS, YOU CAN'T PUT A THOUSAND DOLLAR SADDLE
17 ON A \$10 HORSE, AND THAT'S WHAT'S GOING ON HERE.

18 THE COURT: ALL RIGHT. THANK YOU.

19 HERE'S WHAT WE ARE GOING TO DO ON THIS ISSUE, THEN I WOULD
20 LIKE TO TURN TO SOME OF THESE OTHER ITEMS IN THE SECOND MOTION
21 IN LIMINE.

22 ON WHAT EVIDENCE OR WHAT INTRODUCTION OF THERANOS'S
23 BUSINESS IS GOING TO BE PERMITTED, I WILL LET THERANOS DESCRIBE
24 TO THIS JURY WHO IT IS TODAY, JUST AS I WILL LET THE FUISZ'S
25 DESCRIBE TO THIS JURY WHO THEY ARE TODAY. I THINK IT'S

1 IMPORTANT FOR THE JURY TO HAVE SOME BASIC UNDERSTANDING OF WHO
2 EACH PARTY IT.

3 I WILL ALSO ALLOW THERANOS, IF IT LIKES, TO SPEAK ABOUT
4 WHO THEY WERE BACK IN 2005. I THINK THAT'S ALSO FAIR GAME AND
5 IT'S RELEVANT TO A NUMBER OF THESE ISSUES.

6 BUT AS TO SPECIFIC ITEMS, I AM GOING TO GRANT THIS MOTION
7 IN PART.

8 NUMBER ONE, I'M NOT GOING TO ALLOW ANY DISCUSSION OR
9 EVIDENCE REGARDING SPECIFIC THERANOS CUSTOMERS. THAT
10 INFORMATION DID NOT APPEAR TO HAVE BEEN FAIR GAME DURING THE
11 DISCOVERY.

12 AND I ALSO HAVE A HARD TIME UNDERSTANDING EXACTLY HOW IT
13 WOULD BE RELEVANT TO THE ISSUES THAT WERE -- THAT ARE GOING TO
14 BE DISPUTED AT TRIAL THAT RELATE TO 2005 AND 2006.

15 ON INVESTORS, IT SEEMS PRETTY CLEAR TO ME FROM THE
16 TRANSCRIPTS I READ ANY WAY THAT THERE WERE SOME FAIRLY SPECIFIC
17 IMPEDIMENTS TO DISCOVERY OF WHO THESE INVESTORS ARE OR HOW MUCH
18 MONEY THEY PUT INTO THE COMPANY.

19 SO I WILL EXCLUDE AND AM EXCLUDEING ANY EVIDENCE
20 REGARDING INVESTOR NAMES OR INVESTOR DOLLARS. SO WITH THAT
21 GUIDANCE, I THINK WE CAN PROCEED.

22 I WANT TO TURN NEXT TO THE ISSUE REGARDING THE TEREX
23 LITIGATION AS WELL AS THE BIOVAIL LITIGATION.

24 MR. UNDERHILL: YOUR HONOR, MAY I ASK ONE
25 CLARIFICATION QUESTION?

1 THE COURT: GO AHEAD.

2 MR. UNDERHILL: ON THE INVESTOR THING, WOULD A
3 WITNESS WHO IS TESTIFYING BE PERMITTED TO SAY THAT I'M AN
4 INVESTOR OF THERANOS?

5 THE COURT: WELL, I AM GOING TO PERMIT THAT, LET ME
6 EXPLAIN WHY.

7 I WOULD THINK THAT, IF ANYTHING, THE DEFENDANTS MAY HAVE
8 SOME INTEREST IN ELICITING THAT INFORMATION FOR PURPOSES OF
9 BIAS AND SO FORTH, SO I THINK ACTUALLY YOU ALL HAVE A COMMON
10 INTEREST ON THAT.

11 SO I APPRECIATE YOUR RAISING THAT CLARIFICATION,
12 MR. UNDERHILL.

13 MR. UNDERHILL: THANK YOU, YOUR HONOR.

14 THE COURT: LET'S TALK ABOUT TEREX AND BIOVAIL.

15 GO AHEAD, MR. FUISZ. TELL ME ABOUT THE CONCERN YOU HAVE.
16 I THINK I UNDERSTAND YOUR POSITION.

17 MR. JOE FUISZ: MY CONCERN IS SIMPLE, THAT TEREX
18 MATTER, THIS IS A HISTORICAL MATTER, IT IS VERY OLD, IT'S
19 EXTREMELY COMPLEX.

20 WHILE IT IS ABSOLUTELY TRUE, AS PLAINTIFFS POINTED OUT IN
21 THEIR REPLY, THAT THE U.S. GOVERNMENT DID NOT ASSERT STATE
22 SECRET PRIVILEGE AROUND THE SPECIFIC ISSUE OF THE DOCUMENTS,
23 STATE SECRET PRIVILEGE ABSOLUTELY ATTACHES TO THE CONTEXT OF
24 THE TESTIMONY THAT IS PROFFERED IN THIS CASE. AND I'M HAPPY TO
25 GO IN CAMERA AND TALK TO YOU ABOUT IT IF YOU WANT TO.

1 BUT TO TAKE TESTIMONY THAT WAS EXTREMELY CONSTRAINED AND
2 FRAMED IN PECULIAR WAYS AND REGURGITATE IT HERE, IS EXTREMELY
3 PREJUDICIAL AND UNFAIR, NUMBER ONE.

4 NUMBER TWO, I THINK IT'S ADMISSIBLE ANY WAY UNDER RULES
5 OF EVIDENCE. THIS IS NOT -- I MEAN, THIS IS NOT A CRIMINAL
6 CASE, THEY DON'T COME IN UNDER -- I DON'T EVEN SEE HOW IT CAN
7 COME IN. THEY DIDN'T -- PLAINTIFFS HAVE NOT TRIED TO DO
8 DISCOVERY ON THIS. PETER GHAVAMI WHO PROVIDED THIS HEARSAY
9 AFFIDAVIT, WAS IN FEDERAL CUSTODY WAS SENTENCED BY JUDGE KIMBA
10 WOOD. THEY DIDN'T SEEK HIS DEPOSITION.

11 IF PRESUMABLY IF THE PRESIDING JUDGE IN TEREX, ROYCE
12 LAMBERTH, HAD FELT THAT MY BROTHER JOHN WAS GUILTY OF SOME SORT
13 OF HORRIFIC CONDUCT, HE WOULDN'T HAVE SWORN HIM INTO THE BAR
14 WHICH IS A MATTER OF PUBLIC RECORD.

15 FRANKLY, I MEAN TO REALLY -- QUITE APART, EVEN FROM THE
16 STATE SECRETS ISSUES INVOLVED, THE COMPLEXITY OF THE TEREX
17 MATTER IS SUCH THAT IT WOULD TAKE AN EXTRAORDINARY AMOUNT OF
18 TIME TO BRING IT.

19 THIRDLY, IT CERTAINLY CAN'T COME IN AGAINST ME. AND I
20 WOULD FRANKLY TAKE THE POSITION, THIS IS ONE OF THE RARE TIMES
21 I WOULD TAKE A POSITION DIFFERENTLY THAN MY FATHER. IF THEY
22 THINK THEY CAN SUBMIT THIS AS EVIDENCE THEN I WANT A SEPARATE
23 ADVISORY JURY MYSELF, BECAUSE I'M NOT GOING TO BE PREJUDICED BY
24 THIS.

25 THE COURT: GO AHEAD.

1 MR. RICHARD FUISZ: THE COMMENT I WOULD LIKE TO MAKE
2 IS, AS LITTLE AS THREE HOURS AGO I WAS ON THE PHONE WITH THE
3 CHIEF COUNSEL OF AN AGENCY OF THE U.S. GOVERNMENT.

4 THEY HAVE PUT THE SITUATION AS FOLLOWS: THAT THEY WOULD
5 SEND SOMEONE OUT HERE, HOWEVER AS FAR AS THEY ARE CONCERNED,
6 THEY HAVE LITIGATED AGAINST DAVID BOIES BEFORE. AND I SHOULD
7 SIMPLY MAINTAIN IT IS NOT RELEVANT. AND THE CONTRACT ON ME IS
8 BINDING AND THEY ARE PUTTING ON MY KNOWLEDGE TO ANSWER OR NOT
9 ANSWER CERTAIN QUESTIONS. THEY PUT ME IN A FUNNY POSITION.

10 ON THE OTHER HAND, THEY ARE SAYING IT'S NOT RELEVANT SO
11 THEY CAN'T ASK ABOUT IT ANY WAY, HOW IS IT RELEVANT, SOMETHING
12 HAPPENED 21 YEARS AGO.

13 THANK YOU.

14 THE COURT: MR. UNDERHILL?

15 MR. UNDERHILL: YOUR HONOR, WE CERTAINLY DON'T OBJECT
16 TO A LIMITING INSTRUCTION THAT IT CAN ONLY BE USED AGAINST
17 DR. FUISZ AND NOT MR. FUISZ.

18 WITH RESPECT TO ANY SORT OF STATE SECRETS ISSUE, I DON'T
19 THINK THERE IS ONE. I THINK THIS IS A RED HERRING. THE DOCKET
20 IS OPEN. ANYBODY THAT WANTS TO GET WHATEVER WAS FILED IN THE
21 CASE CAN GET IT AND WE HAVE.

22 THERE'S ALSO NOT GOING TO BE ANY AWKWARD QUESTIONING OF
23 DR. FUISZ, AT LEAST NOT AWKWARD IN THE SENSE OF ASKING HIM TO
24 DISCLOSE ANYTHING THAT MAY BE RELATED TO A STATE SECRET. IT
25 MAY BE AWKWARD FOR OTHER REASONS. BUT OUR QUESTIONS WILL BE

1 CONFINED TO THE FACTS AS THEY HAVE ALREADY BEEN DEVELOPED
2 THROUGH DEPOSITION TESTIMONY OF DR. FUISZ AND TO A LESSER
3 EXTENT, MR. FUISZ.

4 I DO BELIEVE THE FACTS ARE ABSOLUTELY UN DISPUTED THAT
5 JOHN FUISZ WAS PROVIDED WITH BILLING RECORDS FROM SKADDEN BY
6 PETER GHAVAMI AND THAT HE PASSED THEM TO HIS FATHER, DURING
7 SUCH TIME AS THERE WAS LITIGATION BETWEEN HIS FATHER AND TEREX,
8 WHICH WAS REPRESENTED BY SKADDEN.

9 I THINK IT'S ABSOLUTELY UN DISPUTED. WE DON'T NEED THE
10 GHAVAMI AFFIDAVIT I'M PERFECTLY HAPPY TO LET IT GO, WE DON'T
11 NEED T. DR. FUISZ HAS ALREADY PROVIDED THE INFORMATION WE NEED.

12 THE COURT: CAN I ASK YOU ABOUT THE BIOVAIL
13 LITIGATION, IS IT EVEN RELEVANT?

14 MR. UNDERHILL: CORRECT. I DON'T BELIEVE THAT IT IS.
15 I DON'T SEE THE POINT.

16 THE COURT: ON BIOVAIL WE ARE GOING TO EXCLUDE ANY
17 REFERENCE TO THE BIOVAIL LITIGATION.

18 LET ME CUT TO THE CHASE ON TEREX. I CAN APPRECIATE THE
19 401 ARGUMENT, BUT I'M NOT ABOUT TO UNLEASH A SATELLITE
20 LITIGATION IN THIS TRIAL. IT'S GOING TO BE CONFUSING TO THE
21 JURY OF WHO WAS SAYING WHAT, WHEN AND WHERE. IT'S OUT UNDER
22 403.

23 LET'S TURN IF WE COULD TO THE PROSECUTION POWER OF
24 ATTORNEY ISSUE.

25 MR. FUISZ, DO YOU WANT TO SUPPLEMENT YOUR PAPERS THERE?

1 MR. JOE FUISZ: NO, YOUR HONOR.

2 I JUST WANTED TO MAKE SURE THAT, BECAUSE WE FILED A LATE
3 REPLY BRIEF TO THE OPPOSITION WITH THE WILSON SONSINI POWER OF
4 ATTORNEY --

5 THE COURT: I HAVE IT.

6 MR. JOE FUISZ: THANK YOU, YOUR HONOR.

7 I THINK THAT ILLUSTRATES THE COMPLETE LACK OF PROBATIVE
8 NATURE OF THE MCDERMOTT POWER OF ATTORNEY.

9 AND I FRANKLY THINK THAT THESE THINGS WHICH ARE ALL
10 RELATIVELY FAMILIAR TO US, TO A JURY ARE FRANKLY NOT GOING TO
11 BE VERY EASY.

12 AND QUITE HONESTLY, YOU COULD SAY THIS IS MY PROBLEM AND
13 IT MAY WELL BE MY PROBLEM, BUT THE POWER OF ATTORNEY WAS ONLY
14 EXPLORED BY MY BROTHER IN DEPOSITION. I DO NOT BELIEVE
15 MCDERMOTT IS GOING TO WILLINGLY SEND OUT PEOPLE.

16 SO I THINK IT'S ONE OF THESE THINGS THAT'S ABSOLUTELY
17 PROBATIVE OF NOTHING, AND YET QUITE FRANKLY, IT'S NOT GOING TO
18 BE THE EASIEST THING FOR ME TO EXPLAIN MCDERMOTT'S NORMAL
19 PROCEDURES TO A JURY.

20 THE COURT: OKAY.

21 MR. JOE FUISZ: THANK YOU, YOUR HONOR.

22 THE COURT: MR. UNDERHILL, DO YOU WANT TO RESPOND?

23 MR. UNDERHILL: WELL, CERTAINLY YOUR HONOR, THERE WAS
24 AN OPPORTUNITY TO CONDUCT DISCOVERY AGAINST MCDERMOTT.

25 THE COURT: THEY WERE SUBPOENAED IN THIS CASE,

1 WEREN'T THEY?

2 MR. UNDERHILL: WELL, THEY TESTIFIED IN THE CASE,
3 YOUR HONOR. THERE WAS A DEPOSITION OF MCDERMOTT.

4 AND THE COURT HAS ALREADY FOUND THAT IT IS PROBATIVE. I
5 THINK THE COURT IS ABSOLUTELY CORRECT, ANY QUIBBLE ON THE OTHER
6 SIDE DOES NOT GO TO ADMISSIBILITY, IT GOES TO THE WEIGHT OF IT.

7 AND IF, YOU KNOW, JOHN FUISZ WANTS TO ARGUE THAT
8 SUPPOSEDLY EVERYBODY IN THE FIRM WITH A BAR NUMBER WAS INCLUDED
9 ON THIS, THEY MAY.

10 I ALSO, YOUR HONOR, BELIEVE THAT YOU KNOW, WE HAVE A
11 PREJUDICE PROBLEM WITH THE WILSON SONSINI DOCUMENT. THIS IS
12 THE VERY FIRST TIME WE HAVE SEEN IT. IT WAS NOT PRODUCED IN
13 DISCOVERY.

14 AT A MINIMUM, IF THEY WANT TO USE THE WILSON SONSINI
15 DOCUMENT, WE WOULD LIKE AN OPPORTUNITY TO CALL SOMEONE FROM
16 WILSON SONSINI TO EXPLAIN WHAT'S GOING ON.

17 I DO NOT THINK THAT THIS IS GOING TO BECOME AN ELABORATE
18 SIDE SHOW. IT'S ONE DOCUMENT. AND IT CERTAINLY GOES TO THE
19 QUESTION ABOUT WHETHER OR NOT JOHN FUISZ KNEW THAT THERANOS WAS
20 A CLIENT OF MCDERMOTT.

21 THE COURT: ALL RIGHT.

22 ANY LAST WORD, MR. FUISZ?

23 MR. JOE FUISZ: LISTEN, YOUR HONOR, IF YOU WANT TO
24 GIVE HIM THIS DOCUMENT, GIVE ME THE WILSON SONSINI DOCUMENT, I
25 WILL TAKE IT AS 75 ADMISSIONS THAT THEY DON'T KNOW WHO THE

1 INVESTORS ARE ON THE CASE, IF IN FACT THOSE ARE ALL ATTORNEYS
2 OF RECORD PROSECUTING THE ATTORNEY FOR THERANOS.

3 THE COURT: OKAY. HERE'S WHAT WE ARE GOING TO DO ON
4 THIS ISSUE.

5 I DO THINK THE POWER OF ATTORNEY IS RELEVANT. I
6 APPRECIATE CONCERN ABOUT JUROR CONFUSION. ON THIS ISSUE I
7 THINK I CAN ADDRESS THAT WITH ANY LIMITING INSTRUCTION THAT
8 EITHER SIDE WISHES TO PROPOSE, OR FURTHER INSTRUCTION ABOUT THE
9 SIGNIFICANCE OF THE DOCUMENT, BUT I'M GOING TO LET THE DOCUMENT
10 IN.

11 AS FOR THIS WILSON SONSINI DOCUMENT THAT WAS REFERENCED
12 IN THE REPLY THAT I RECEIVED, I'M GOING TO LET IT IN AS WELL.

13 IF THERANOS TRULY BELIEVES THERE'S ADDITIONAL DISCOVERY
14 IT NEEDS FROM WILSON OR WANTS TO CALL SOMEONE FROM WILSON IN
15 ORDER TO PUT THAT PAGE INTO CONTEXT, I WILL PERMIT IT. BUT I
16 THINK THE JURY CAN SORT THROUGH THIS ONE, I'M NOT TOO WORRIED
17 ABOUT THAT.

18 LET'S TURN -- I THINK THAT COVERS THE ISSUES IN THE
19 SECOND MOTION IN LIMINE.

20 MR. JOE FUISZ: ACTUALLY THE REDUCTION OF PRACTICE
21 ISSUE, YOUR HONOR.

22 THE COURT: OKAY. GO AHEAD.

23 MR. JOE FUISZ: NO, YOUR HONOR, I JUST, I JUST, I
24 FEEL LIKE WE ARE IN A BIT OF A QUANDARY, WHICH I UNDERSTAND
25 MR. MARSILLO CLEARLY TOOK THE POSITION TO WALL OFF DISCOVERY ON

1 THE REDUCTION OF PRACTICE AND RELY ON THEIR FILING DATES, WHICH
2 I CERTAINLY UNDERSTAND INTELLECTUALLY WHY THEY TOOK THAT
3 POSITION.

4 BUT WHAT I WAS CONCERNED ABOUT WAS WHEN WE SAW THE PRETRIAL
5 DRAFT FROM PLAINTIFF'S COUNSEL, THEY IDENTIFY ALL THESE
6 HISTORICAL FOLKS WHO, A, HAVE NOT BEEN DEPOSED IN THE CASE; AND
7 B, WE HAD NO REASON TO DEPOSE BECAUSE THEY WEREN'T NAMED AS
8 INVESTORS INVENTORS.

9 SO WHILE I APPRECIATE IN PLAINTIFF'S REPLY TO OUR MOTION
10 THEY SAID, WELL, LOOK, WE DID LET YOU ASK QUESTIONS ABOUT KEMP,
11 ALTHOUGH I DON'T KNOW I'VE SEEN THE ANSWERS TO THOSE QUESTIONS,
12 I DON'T THINK BEING ALLOWED TO QUESTION MR. KEMP ABOUT
13 REDUCTION OF PRACTICE IN THE ABSENCE OF HAVING MATERIALS, IS A
14 FAIR -- IS FAIR CROSS-EXAMINATION ON DISCOVERY.

15 SO YOU KNOW, I WOULD RESPECTFULLY ASK THE COURT TO EITHER
16 ENTIRELY EXCLUDE TESTIMONY FROM THERANOS PERSONNEL ABOUT
17 REDUCTION OF PRACTICE, OR AT A VERY MINIMUM TO SEVERELY
18 RESTRICT IT, SIMPLY BECAUSE WE HAVE NEVER SEEN THE DOCUMENTS.

19 THANK YOU, SIR.

20 THE COURT: MR. UNDERHILL?

21 MR. UNDERHILL: I THINK THERE MAY BE A LITTLE BIT OF
22 A DISCONNECT HERE ON TERMINOLOGY.

23 WE DON'T PLAN TO PUT ON REDUCTION TO PRACTICE. AND I USE
24 THAT IN QUOTES. WE, YOU KNOW, MADE THE POINT AND WE ARE
25 ABSOLUTELY, YOU KNOW, I BELIEVE ON THE RIGHT SIDE OF THE LAW AS

1 THE COURT FOUND. WE DON'T HAVE TO SHOW REDUCTION TO PRACTICE.
2 WE HAVE PROVISIONALS WHICH ARE THE CONSTRUCTIVE REDUCTION TO
3 PRACTICE.

4 SO THEREFORE I THINK WE ARE REALLY TALKING ABOUT A
5 DIFFERENT ISSUE. WE ARE REALLY TALKING ABOUT, CAN THERANOS
6 TALK ABOUT PRODUCTS THAT IT ACTUALLY MADE IN THE LAB OR
7 PROTOTYPES THAT RELATE AND SUPPORT THE PROVISIONALS.

8 AND THE ANSWER IS, WELL, SURE. I MEAN WE PROVIDED THAT
9 DISCOVERY. I MEAN, THAT'S WHAT TIM KEMP'S DEPOSITION WAS
10 LARGELY ABOUT WAS HIM TALKING ABOUT THE DIFFERENT PROTOTYPES
11 THAT HE MADE IN THE LAB.

12 SO I THINK THIS IS PERFECTLY APPROPRIATE DISCOVERY, IT
13 WAS NEVER DENIED, AND I THINK IT'S A LITTLE CONFUSING TO REFER
14 TO IT AS REDUCTION TO PRACTICE EVIDENCE.

15 THE COURT: MR. FUISZ, GO AHEAD.

16 MR. JOE FUISZ: AND I APOLOGIZE. I MEAN, THIS AS A
17 SINCERE FOLLOW UP BECAUSE OF THE AEO ISSUES. I HAVEN'T SEEN
18 THE DOCUMENTS.

19 MY UNDERSTANDING, AND I'M GOING APART FROM MR. MARSILLO'S
20 REPRESENTATIONS, IF MR. UNDERHILL IS SAYING THAT MR. KEMP IS
21 GOING TO TESTIFY TO SPECIFIC WORK THAT ACTUALLY CORRELATES TO
22 AEO DOCUMENTS THAT EXIST AND BE PRODUCED, THEN I THINK OUR
23 CONCERN WOULD GO AWAY.

24 BUT IF HE'S GOING TO TESTIFY ABOUT SOME REDUCTION OF
25 PRACTICE THAT HAS NOT BEEN REFLECTED IN THE DOCUMENTATION THEN

1 MY OBJECTION STANDS.

2 THE COURT: MR. UNDERHILL, CAN YOU SPEAK TO THAT?

3 MR. UNDERHILL: WELL, I THINK HE IS GOING TO TESTIFY
4 ALONG THE LINES OF WHAT WAS IN HIS DEPOSITION. AND WILL HE
5 ANSWER ANY QUESTIONS THAT WERE NOT SPECIFICALLY ASKED IN THE
6 DEPOSITION? I'M SURE THAT HE WILL.

7 BUT THE POINT IS THAT OPPOSING COUNSEL HAD FREE AND AMPLE
8 OPPORTUNITY AND A FULL DEPOSITION TO ASK HIM WHATEVER WANTED TO
9 ASK HIM.

10 THIS IS NOT -- THERE'S NO SECRET TESTIMONY HERE THAT'S
11 GOING TO BLOW EVERYTHING UP, THIS IS JUST AN OPPORTUNITY FOR
12 MR. KEMP, ONE OF THE CO INVENTORS HERE TO EXPLAIN WHAT HE WAS
13 DOING.

14 THE COURT: GO AHEAD.

15 MR. JOE FUISZ: IF I MAY, THIS IS THE FUNDAMENTAL
16 DISPUTE. CAN I CROSS-EXAMINE ADEQUATELY IN THE ABSENCE OF
17 DISCOVERY? I -- I THINK THE ANSWER IS NO.

18 BUT THANK YOU, YOUR HONOR.

19 THE COURT: OKAY.

20 LET ME PERHAPS DRAW A SLIGHTLY DIFFERENT LINE THE PARTIES
21 HAVE DISCUSSED.

22 MS. ANDERSON, ARE YOU SEEKING TO WEIGH? IN IF YOU ARE,
23 GO AHEAD, MA'AM.

24 MS. ANDERSON: YES, I AM.

25 AND THE REASON IS BECAUSE AS AEO COUNSEL I'VE HAD THE

1 OPPORTUNITY TO LOOK AT KEMP'S DEPOSITION IN ITS ENTIRETY. AND
2 IT DOES SPEAK ABOUT KEMP'S INVOLVEMENT ON EACH ONE OF THESE
3 PROVISIONAL APPLICATIONS THAT ARE SPECIFICALLY NAMED AS
4 CLIENTS.

5 AND I DO FIND IT QUITE UNSEEMLY THAT ON ONE HAND THE
6 REDACTIONS PERSIST ON KEMP'S DEPOSITION ON THESE KEY AREAS.
7 BUT ON THE OTHER HAND, PLAINTIFF'S WISH TO PRODUCE TESTIMONY,
8 EVIDENCE AT TRIAL, WITHOUT GIVING THESE DEFENDANTS AN
9 OPPORTUNITY TO REVIEW THE DEPOSITION IN ITS ENTIRETY WITH
10 REGARD TO THESE MATTERS.

11 AND I'M JUST TALKING ABOUT, FOR INSTANCE, THE APPLICATION
12 UNDER 192 BEGINNING ON PAGE 35 OF THE DEPOSITION. THERE'S
13 SPECIFIC DISCUSSION THAT FROM WHAT I'M HEARING FROM
14 MR. UNDERHILL, I UNDERSTAND THAT THEY PRESENTING THIS TESTIMONY
15 BEFORE THE JURY, AND BECAUSE MR. FUISZ AND DR. FUISZ HAVE NOT
16 SEEN THE TESTIMONY, IT'S ESSENTIALLY A TRIAL BY AMBUSH.

17 THE COURT: OKAY.

18 IF I COULD, I THINK PERHAPS I MIGHT OFFER SOME HELPFUL
19 GUIDANCE HERE.

20 AS WE'VE TALKED ABOUT, I THINK MULTIPLE TIMES, CERTAINLY
21 AT LEAST ONCE, I'M NOT GOING TO PERMIT THE INTRODUCTION OF
22 EVIDENCE INTO THIS COURTROOM THAT WILL REQUIRE ANY KIND OF
23 SHIELDING FROM EITHER MR. FUISZ OR DR. FUISZ. I THINK I RECALL
24 A HEALTHY DIALOG WITH MR. UNDERHILL ABOUT THAT AT SOME PRIOR
25 HEARING.

1 SO I DON'T THINK WE HAVE ANY CONCERNS OR WORRIES ABOUT
2 ANY AMBUSH HERE BECAUSE I'M NOT GOING TO PERMIT THAT AMBUSH AND
3 I'VE ALREADY MADE THAT CLEAR.

4 WITH RESPECT TO OTHER TESTIMONY FROM MR. KEMP, IT IS
5 MR. KEMP?

6 MR. UNDERHILL: YES.

7 THE COURT: OKAY. I WANT TO BE CLEAR.

8 I WILL PERMIT MR. KEMP TO SPEAK TO HIS DEVELOPMENT OF
9 PROTOTYPES, SOME OF WHICH MAY HAVE BEEN DISCUSSED IN THE
10 DEPOSITION AND PRESUMABLY MADE AVAILABLE TO EACH OF THE FUISZ'S
11 TO REVIEW. SOME OF WHICH MAY NOT, MAY NOT JUST HAVE BEEN
12 ASKED, BUT IT'S GOING TO COME OUT IN THIS COURTROOM, I'M GOING
13 TO ALLOW EACH OF THE FUISZ'S TO HEAR IT AND CROSS-EXAMINE ON
14 IT.

15 THE FINAL ISSUE IS I USE THE WORD PROTOTYPES SPECIFICALLY
16 BECAUSE AS WE JUST TALKED ABOUT, I'M DISTINGUISHING BETWEEN THE
17 WORK IN THE LABORATORY WHICH MAY HAVE EVIDENCED A REDUCTION OF
18 PRACTICE OR OTHER WORK MR. KEMP WAS DOING THAT SUPPORTS HIS
19 TESTIMONY FROM THE COMMERCIAL PRODUCTS I AM EXCLUDING PURSUANT
20 TO MY EARLIER RULINGS.

21 SO IF ANYONE HAS ANY QUESTIONS ABOUT THAT, NOW IS THE
22 TIME TO ASK, BUT I THINK THAT'S A CLEAR LINE TO GIVES EVERYBODY
23 SOME GUIDANCE AS TO HOW WE ARE GOING TO PROCEED.

24 HEARING NO QUESTIONS.

25 MS. ANDERSON: YOUR HONOR, I DO HAVE QUESTIONS AND WE

1 MAY HAVE TO ADDRESS IT IN THE AEO PORTION OF THIS HEARING. AND
2 IT DEALS SPECIFICALLY WITH THE PROTOTYPES BECAUSE THEY WERE
3 DISCUSSED IN HERE. AND I WOULD LIKE TO TAKE THAT UP IN THAT
4 PORTION OF THE HEARING.

5 THE COURT: I'M HAPPY TO TAKE IT UP AT THAT TIME.

6 OKAY. I THINK THAT TAKES CARE OF THE ISSUES IN THE TWO
7 DEFENDANT'S MOTION IN LIMINE.

8 WITH THAT I WOULD LIKE TO TURN -- I DON'T THINK ANYBODY
9 IS PREJUDICED HERE, LET'S JUST KEEP GOING WITH THE MOTIONS THAT
10 THE DEFENDANTS HAVE PRESENTED, IN PARTICULAR THE DAUBERT
11 MOTIONS ON LEONARD, CLARKE AND ROBERTSON.

12 MR. FUISZ?

13 MR. JOE FUISZ: YEAH -- NO.

14 I WILL -- AGAIN, I KNOW YOUR HONOR HAS REVIEWED
15 EVERYTHING SO I WILL BE VERY QUICK.

16 I FEEL LIKE, YOU KNOW, I REALLY FEEL LIKE THE PLAINTIFFS
17 ARE INVITING YOU TO MAKE NEW LAW IN TERMS OF IF IN FACT
18 MR. LEONARD IS ALLOWED TO OPINE ON AUTHORSHIP. I THINK THE
19 CASE LAW IS NINTH CIRCUIT CASE LAW IS OVERWHELMINGLY CLEAR BOTH
20 BEFORE AND AFTER DAUBERT.

21 THE SINGLE, OVERWHELMING TO THE POINT I'M NOT EVEN GOING
22 TO LIST IT, I ASSUME YOUR HONOR HAS SEEN IT. THE SINGLE CASE
23 IN FEDERAL COURT THAT PLAINTIFFS HAVE BEEN ABLE TO POINT TO
24 WHERE LEONARD HAS BEEN ALLOWED TO OPINE ON AUTHORSHIP --

25 THE COURT: YOU'RE SPEAKING OF JUDGE KAPLAN'S CASE

1 THE DONZINGER.

2 MR. JOE FUISZ: PRECISELY.

3 BUT IN DONZINGER, YOU HAD A CASE, YOU HAD 90-WORD STRING OF
4 REPETITION, ACTUAL COPYING. WHEREAS HERE, LEONARD IS TRYING TO
5 USE CONTENT SIMILARITIES FROM WHICH TO OPINE AUTHORSHIP.

6 IN THE DONZINGER CASE, HE HAD 90 WORDS WITH AUTHOR
7 GRAPHICAL ERRORS. I HAD TO LOOK THAT UP, I BELIEVE IT'S
8 SPELLING OF GRAMMATICAL ERRORS, AND DONZINGER DIDN'T CONTEST
9 COPYING HAD OCCURRED. HE DIDN'T TRY TO DAUBERT LEONARD BECAUSE
10 DONZINGER'S DEFENSE WAS IT WAS COPYING, BECAUSE I'M NOT
11 RESPONSIBLE BECAUSE I DIDN'T DO IT.

12 SO I THINK WITH THAT -- TRYING TO RELY ON DONZINGER
13 AGAINST THE OVERWHELMING WEIGHT OF CASE LAW WHICH EITHER THROWS
14 OUT LINGUIST ENTIRELY, OR AT MOST ALLOWS THEM TO PRESENT A SORT
15 OF IN SOME CHART FORM, THEIR ANALYSIS AND THEN INVITE THE JURY
16 OR JUDGE AS THE TRIER OF FACT TO REACH CONCLUSION.

17 IF YOUR HONOR WANTS TO ALLOW LEONARD TO TESTIFY, I DON'T
18 HAVE A HUGE PROBLEM WITH THAT. I THINK THE CASE LAW FRANKLY
19 WOULD SUPPORT KICKING HIM OUT ENTIRELY.

20 BUT I STRONGLY FEEL, AND FRANKLY TO A POINT WHERE I
21 PROBABLY SHOULDN'T SAY THIS, I'M ACTUALLY ANGRY AT PLAINTIFF'S
22 COUNSEL BECAUSE I FEEL LIKE THEY REALLY MISREPRESENTED THE LAW
23 HERE. THE NOTION THAT LEONARD COULD TESTIFY ON AUTHORSHIP IS
24 JUST NOT SUPPORTED.

25 THE COURT: OKAY.

1 GO AHEAD, DR. FUISZ.

2 MR. RICHARD FUISZ: LOOK, I'M NOT A LAWYER, BUT
3 RELATIVE TO LEONARD, THE PART I FIND FASCINATING IS WHEN HE
4 OPINES ON THIS TOPIC, HE DECLINES EVEN TO GIVE A NUMERICAL
5 PERCENTAGE OF PROBABILITY. AND HE JUST SAYS IT'S HIS PERSONAL
6 BEST GUESS, BASICALLY. AND HE DECLINES TO GIVE A NUMBER.

7 AND MY -- WHAT ASTOUNDS ME IS, A LIE DETECTOR TEST, THERE
8 ARE EXISTING NUMBERS AS TO WHAT THEIR ACCURACY IS. BUT I DON'T
9 THINK THEY ARE ALLOWED IN THIS COURTROOM.

10 SO IN EFFECT, YOU WOULD BE ALLOWED SOMEONE IN HERE WHOSE
11 CONCLUSION IS LESS ADEQUATELY PROVEN THAN EVEN LIE DETECTORS.
12 IT'S SIMPLY THIS MAN'S OPINION.

13 NUMBER TWO, WHICH REALLY I JUST FIND OBJECTIONABLE. HE'S
14 TAKEN AN E-MAIL OF MINE TO MY COUNSEL, WHICH AFTER 120
15 INVENTIONS IN ALL THESE YEARS, THOSE E-MAILS NATURALLY ARE VERY
16 DIRECTIVE OF CONTENT.

17 AND HE'S COMPARED THAT TO A PATENT FILING OF THERANOS.

18 WELL, SINCE THE FIELDS ARE NOT THAT BROADLY DIFFERENT, I
19 JUST CAN'T FATHOM HOW ONE CAN TAKE THESE KEY WORDS AND SAY, I
20 HAVE COME TO A CONCLUSION BASED ON THESE KEY WORDS, FROM
21 DR. FUISZ'S E-MAILS VERSUS THERANOS PROVISIONALS, THAT THESE
22 SOMEHOW -- MY BEST OPINION IS THEY WERE TAKEN. I JUST THINK
23 THAT'S TERRIBLE.

24 THANK YOU.

25 THE COURT: THANK YOU.

1 MR. JAY: YOUR HONOR, YOUR HONOR, LEONARD IS NOT
2 OPINING ON AUTHORSHIP. WHAT THE FUISZ'S ARE TALKING ABOUT HERE
3 GOES TO THE WEIGHT OF THE EVIDENCE NOT ITS ADMISSIBILITY. AND
4 JUST TO DISCUSS THE CHEVRON VERSUS DONZINGER MATTER, ACTUALLY
5 IN THE RULING THAT JUDGE KAPLAN ISSUED YESTERDAY, JUDGE KAPLAN
6 IN SPECIFICALLY TALKING ABOUT --

7 THE COURT: I WILL CONFESS, I HAVE NOT READ ALL
8 500 PAGES.

9 MR. JAY: FAIR ENOUGH.

10 I THINK THE ONE SORT OF IMPORTANT PIECE OF IT IS WHEN
11 DISCUSSING DR. LEONARD'S ANALYSIS WHERE HE USED THE SAME
12 METHODOLOGY AS THAT WHICH HE USED HERE, JUDGE KAPLAN SAID THE
13 COURT FINDS THAT THE METHODOLOGIES USED BY THE CHEVRON EXPERTS
14 WERE RELIABLE AND ADMISSIBLE, CREDITS THEIR TESTIMONY AND
15 ADOPTS THEIR FINDINGS.

16 IF THE FUISZ'S TAKE ISSUE WITH SORT OF THE LEVEL OF
17 DETAIL HERE, THEY ARE FREE TO ELICIT THAT INFORMATION ON
18 CROSS-EXAMINATION, BUT I DON'T THINK THERE'S ANYTHING THAT
19 WARRANTS EXCLUDEING THE TESTIMONY OF DR. LEONARD.

20 THE COURT: ALL RIGHT.

21 I THINK I HAVE YOUR RESPECTIVE POSITIONS.

22 THANK YOU, COUNSEL.

23 I'M GOING TO GRANT THIS MOTION ONLY IN PART. I'M GOING
24 TO PRECLUDE DR. LEONARD FROM OFFERING TESTIMONY, AND THE
25 ULTIMATE QUESTION OF WHETHER PLAGIARISM OCCURRED, THAT STRIKES

1 ME AS UNWISE AND UNRELIABLE.

2 HOWEVER, I WILL ALLOW HIM TO OFFER TESTIMONY ON
3 LINGUISTICS SIMILARITIES, SEMANTICS SIMILARITIES, AND THAT'S
4 SUBJECT TO GOOD CROSS-EXAMINATION, AND I THINK THE JURY WILL BE
5 ABLE TO SORT THAT OUT.

6 SO THAT MOTION IS GRANTED

7 MR. JOE FUISZ: YOUR HONOR, ONE QUESTION, I'M AFRAID
8 WHEN I WAS WRITING THIS I WAS IMPROPERLY RAISING THE DAUBERT
9 MAYBE I SHOULD'VE MENTIONED IT SOMEWHERE ELSE, BUT WE DID WANT
10 TO CHALLENGE HIS PERCENTAGES WHICH HE BELIEVES IS GOOGLE
11 DATABASE.

12 THE COURT: THE GOOGLE PATENT ISSUE.

13 MR. JOE FUISZ: PERHAPS WE SHOULD ADDRESS THAT BY IN
14 LIMINE, OR LATER OR NOW AS THE CASE MAY BE.

15 THE COURT: I WOULD LIKE TO ADDRESS IT NOW.

16 I WILL SAY, IF I UNDERSTAND YOUR ARGUMENT FROM YOUR BRIEF
17 MR. FUISZ, YOU WERE NEVER PROVIDED WITH ANY ADEQUATE NOTICE TO
18 INVESTIGATE HOW RELIABLE THE GOOGLE PATENT DATABASE IS. SO ANY
19 ESTIMATES BASED ON IT IN YOUR OPINION WOULD BE UNFAIR?

20 MR. JOE FUISZ: AND IT WOULD CERTAINLY BE.

21 I USE GOOGLE PATENTS, I THINK IT'S A DESCENT SERVICE, DON'T
22 MISUNDERSTAND ME, BUT YOU CERTAINLY CAN'T USE IT 8 MILLION AS A
23 DENOMINATOR AND OPINE ON PERCENTAGE TERMS.

24 IF HE WANTS TO SAY HE DID A PARTICULAR SEARCH AND GOT 16
25 RESULTS, I DON'T HAVE A PROBLEM WITH THAT. BUT TO PRESENT IT

1 AS A PERCENTAGE ON A PRESUMED DENOMINATOR, I THINK IS UNFAIR.

2 THE COURT: ALL RIGHT.

3 MR. JAY: I MEAN, THE FUISZ'S OWN EXPERT DR. JUOLA
4 ENGAGED IN A SIMILAR BUT ACTUALLY LESS ACCURATE ANALYSIS HERE.

5 I MEAN, DR. LEONARD WENT THROUGH A DATABASE THAT HAD NEARLY
6 8 MILLION DOCUMENTS, IT HIS ANALYSIS, AND DR. JUOLA IN HIS
7 DEPOSITION ADMITTED THE ANALYSIS DR. LEONARD ENGAGED IN WAS A
8 VALID ANALYSIS THAT SUPPORTED PLAINTIFF'S THEORIES IN THIS
9 CASE.

10 THE COURT: ALL RIGHT.

11 AS I UNDERSTAND IT, THIS TESTIMONY FROM DR. LEONARD CAME IN
12 RESPONSE TO DR. JUOLA THIS WAS PART OF A SUPPLEMENTAL REPORT,
13 HAVE I GOT THAT RIGHT.

14 MR. JAY: THAT'S CORRECT.

15 AND THE FUISZ'S COULD HAVE ENGAGED IN ANY SORT OF
16 INVESTIGATION INTO THE GOOGLE PATENT DATABASE THAT ONE THERE'S
17 NOTHING THAT WE DID THAT STOPPED THEM FROM DOING THAT OR
18 QUESTIONING DR. LEONARD ABOUT THAT.

19 MR. JOE FUISZ: YOUR HONOR?

20 THE COURT: GO AHEAD, MR. FUISZ.

21 MR. JOE FUISZ: YOUR HONOR, THE FACT DISCOVERY WAS
22 OVER WHEN THE EXPERT DEPOSITIONS HAPPENED. I COULDN'T DEPOSE
23 GOOGLE AT THAT POINT AND TRY TO INVESTIGATE THEIR DATABASE.

24 I'M JUST SAYING IT'S NOT A FAIR DENOMINATOR. AND QUITE
25 FRANKLY, I THINK THEY ARE ALL WITCH DOCTORS. I BELIEVE THIS

1 NEW YORKER ARTICLE, SO I HAD TO BRING IN MY OWN WITCH DOCTOR.
2 I DON'T CREDIT ANY OF IT.

3 MR. UNDERHILL: YOUR HONOR, MAY I RESPOND TO ONE
4 POINT? A NEW POINT.

5 THE COURT: I ACTUALLY DON'T THINK YOU NEED TO,
6 MR. UNDERHILL.

7 I'M GOING TO PERMIT THE REFERENCE TO THE GOOGLE PATENT
8 DATABASE INCLUDING PERCENTAGES, BUT I'M ALSO GOING TO, I WILL
9 SAY, ALLOW DR. FUISZ TO POINT OUT ALL SORTS OF ISSUES WITH THAT
10 DATABASE THEY MIGHT WISH TO POINT OUT DURING CROSS-EXAMINATION.

11 I THINK YOU CAN HIGHLIGHT THESE POINTS EFFECTIVELY AND
12 MAKE YOUR POINT IN THAT FASHION.

13 MR. UNDERHILL: YES, YOUR HONOR.

14 THE COURT: ALL RIGHT. LET'S KEEP GOING.

15 MR. UNDERHILL: YOUR HONOR, MAY I SAY ONE THING
16 THOUGH BASED ON YOUR RULING? CLARIFICATION.

17 IT WAS OBVIOUSLY DIRECTED AT OUR EXPERT, THE NO TESTIMONY
18 ON ULTIMATE QUESTION. MAY I ASSUME THAT THAT RULING ALSO
19 APPLIES TO DR. JUOLA THE OTHER SIDE'S EXPERT, WHO ALSO OFFERS
20 AN OPINION ON THE ULTIMATE QUESTION?

21 THE COURT: WELL, I CAN GIVE YOU THIS GUIDANCE.

22 SINCE I DON'T SPECIFICALLY HAVE A MOTION BEFORE ME ON DR.
23 JUOLA IF THAT TYPE OF QUESTION WERE ASKED OF THE EXPERT, I
24 WOULD CERTAINLY SUSTAIN THE OBJECTION AT THAT POINT IN TIME.

25 MR. UNDERHILL: THANK YOU, YOUR HONOR.

1 THE COURT: YES. OKAY. LET'S TURN TO MR. CLARKE,
2 OR DR. CLARKE, I APOLOGIZE.

3 MR. JOE FUISZ: YEAH, LISTEN, AND YOUR HONOR, AS YOU
4 KNOW, I'M NOT A PATENT ATTORNEY, AND I INVITE YOU TO CORRECT ME
5 IF I'M WRONG.

6 BUT IT SEEMS TO ME THAT FOR CONCEPTION FROM HERE, IN THIS
7 CASE, WHERE YOU DON'T HAVE A SINGLE DOCUMENT, WHERE THERANOS IS
8 ESSENTIALLY LOOKING TO AMALGAMATE MULTIPLE DOCUMENTS, AT A
9 MINIMUM DR. CLARKE WOULD HAVE NEEDED TESTIMONY FROM THE
10 INVENTOR ACTUALLY PUTTING THEM TOGETHER.

11 I DO NOT BELIEVE DR. CLARKE IS ABLE AT HIS OWN INITIATIVE
12 TO BRING DISPARATE DOCUMENTS TOGETHER IN ORDER TO FORM THE
13 INVENTION OF THE '612.

14 AND IN THAT RESPECT, I THINK HIS OPINION OF INVENTORSHIP
15 IS FLAWED BECAUSE I DON'T THINK HE CAN GET TO CONCEPTION.

16 NOW I'VE GOT TO BE HONEST WITH YOU, I DO NOT KNOW WHY --
17 MAYBE THEY COULD HAVE CURED THAT IF THEY HAD GIVEN ELIZABETH
18 HOLMES DEPOSITION TO THEM AND USED THAT. BUT IF YOU LOOK AT
19 WHAT HE REVIEWED, THERE'S NOTHING HE REVIEWED THAT DOES THAT.

20 THE COURT: DO YOU WANT TO SPEAK TO ROBERTSON AS
21 WELL?

22 MR. JOE FUISZ: IT EQUALLY APPLIES TO JANE ROBERTSON.
23 AND YOU KNOW, ALSO KIND OF SOMATICALLY TIMING THIS TO THE 252
24 MOTION TO STRIKE, I ALSO I THINK IT KIND OF COMES FROM A
25 SIMILAR FATAL FLAW. HE CAN'T OPINE ON WHO THE INVENTORS ARE

1 BECAUSE HE SAYS ELIZABETH HOLMES OTHERS. IT'S PRECISELY
2 BECAUSE HE HAS NO NOTION OF WHOSE CONCEPTION HE'S
3 CORROBORATING.

4 SO --

5 THE COURT: MR. FUISZ, IS THAT WHAT HE SAID IN HIS
6 REPORT OR IN DEPOSITION THAT IT WAS MS. HOLMES AND OTHERS.

7 MR. JOE FUISZ: CORRECT.

8 THE COURT: HE DID NOT SPECIFY MR. KEMP.

9 MR. JOE FUISZ: NO, ABSOLUTELY NOT.

10 AND HONESTLY, I MEAN I DON'T WANT TO TAKE A CRACK AT THE
11 PLAINTIFF BUT I DO NOT EVEN KNOW WHERE HE COMES OUT IDENTIFYING
12 HERE. IT SEEMS LOGICALLY HE MIGHT HAVE TRIED TO CLAIM THAT
13 THERANOS COULD HAVE CONCEIVED, IF IN FACT HE HAD SOME EVIDENCE
14 TO CORROBORATE PULLING THESE TOGETHER.

15 AND I THINK IT'S, LOOK, I THINK IT'S A CRITICAL QUESTION
16 FOR THE CASE BECAUSE IT -- IT'S -- IT COMES DOWN TO WHEN
17 THERANOS IS ABLE TO CLAIM CONCEPTION.

18 THE COURT: ALL RIGHT.

19 MR. JAY: YOUR HONOR, MR. FUISZ IS INCORRECT. DR.
20 ROBERTSON AND DR. CLARKE DESCRIBE THAT THE PROPER INVENTORS ARE
21 ELIZABETH HOLMES AND OTHERS AT THERANOS REFERRING TO THOSE AS
22 THERANOS LISTED ON THE PROVISIONAL APPLICATIONS.

23 THE LAW ON THIS COULD NOT BE ANYMORE CLEAR, CONCEPTION
24 NEED NOT BE CORROBORATED BY A SINGLE DOCUMENT. WHAT WE ARE
25 TALKING ABOUT HERE IS FOUR PROVISIONAL PATENT APPLICATIONS THAT

1 ALL CAME FROM THERANOS, THAT EACH REFERENCED EACH OTHER.

2 AND THE LAW IS QUITE CLEAR, THE FEDERAL CIRCUIT IS QUITE
3 CLEAR THAT YOU CAN CORROBORATE CONCEPTION THROUGH MULTI
4 DOCUMENTS.

5 THE COURT: CAN I ASK YOU ONE QUESTION.

6 YOU MENTION THAT MR. KEMP WAS ALSO, I WAS GOING TO SAY
7 MR. JAY -- YOU DON'T WANT TO BE THERE. MR. KEMP WAS ALSO ON
8 THE APPLICATION.

9 ARE THERE OTHERS OF THERANOS WHO WERE LISTED AS WELL,
10 PERHAPS I OVERLOOKED THAT IN REVIEWING THOSE DOCUMENTS?

11 MR. JAY: YES, THERE ARE OTHERS AT THERANOS WHO ARE
12 LISTED ON THE PROVISIONAL APPLICATIONS, THAT IS CORRECT.

13 HOWEVER, THOSE PARTICULAR INVENTORS ON THE PROVISIONAL
14 APPLICATIONS DIDN'T CONTRIBUTE TO THE PORTIONS OF THE
15 PROVISIONAL APPLICATIONS THAT SORT OF MADE THEIR WAY INTO THE
16 '612 PATENT.

17 THE COURT: I UNDERSTAND.

18 MR. UNDERHILL: I JUST WANT TO SAY ONE THING.

19 DR. CLARKE PLAYED IT STRAIGHT. HE LOOKED AT THE
20 PROVISIONALS, HE LOOKED AT THE '612 AND HE OFFERED THE OPINION
21 THAT THESE IDEAS ARE IN THE PROVISIONALS.

22 NOW, YEAH, WE COULD HAVE FED HIM INFORMATION AND SAID,
23 OKAY, EVEN THOUGH THAT'S THERE'S FIVE PEOPLE LISTED ON THE
24 PROVISIONALS, THE TWO YOU WANT TO IDENTIFY ARE ELIZABETH AND
25 TIM.

1 BUT WHY? I MEAN, THAT'S NOT EXPERT TESTIMONY.

2 SO HIS TESTIMONY IS YES, I LOOK AT THE '612, YES, IT'S IN
3 THE PROVISIONALS. SO YES, I FIND THAT, YOU KNOW, ELIZABETH AND
4 OTHERS AT THERANOS ARE THE INVENTORS HERE. AND IT WILL GO TO
5 OTHER WITNESSES TO TESTIFY AS TO WHO WITHIN THE PROVISIONALS
6 INVENTED THE PARTICULAR INFORMATION THAT WE ARE TALKING ABOUT.

7 THE COURT: AM I RIGHT THAT MS. HOLMES IS LISTED ON
8 EACH OF THE PROVISIONALS?

9 MR. UNDERHILL: YES. EXCEPT FOR ONE.

10 MR. JAY: SHE'S LISTED ON THREE OF THE FOUR
11 PROVISIONALS. THE FIRST THREE PROVISIONAL APPLICATIONS.

12 THE COURT: GO AHEAD, MR. FUISZ.

13 MR. JOE FUISZ: NO, BECAUSE I JUST WANT TO BE CLEAR.
14 THESE THERANOS PROVISIONALS DO NOT INCORPORATE EACH OTHER BY
15 REFERENCE. THESE ARE SEPARATE DOCUMENTS. AND IT'S PRECISELY
16 BECAUSE THEY DON'T INCORPORATE OTHERS BY REFERENCE AND I THINK
17 CORROBORATION IS REQUIRED FOR INVENTORSHIP.

18 I DIDN'T OBJECT TO HIS OBVIOUSNESS ANALYSIS BECAUSE THERE,
19 I THINK IN THEORY, AND WE WILL CERTAINLY CROSS-EXAMINE THE
20 CHALLENGE OF PUTTING THEM TOGETHER.

21 BUT WHEN IT COMES TO INVENTORSHIP AND CONCEPTION, SO THE
22 FIRST TIME THERANOS PUTS THESE TOGETHER IS THE FIRST FILING
23 DATE IS 594, MR. UNDERHILL CAN CORRECT ME, WHICH IS FILED
24 MARCH 24, 2006.

25 AND CLARKE WANTS TO MOVE PRIORITY BACK TO MY DAD'S E-MAIL

1 SAYING THEY WERE INVENTORS AS OF SEPTEMBER 23RD, 2005. AND I
2 DON'T THINK HE HAS, BASED ON WHAT HE REVIEWED I DON'T THINK
3 HE -- HE HAS NO BASIS ON HIS OWN TO TAKE DOCUMENTS WHICH DON'T
4 INCORPORATE EACH OTHER BY REFERENCE AND PUT THEM TOGETHER FOR
5 CONCEPTION. HE NEEDED MORE THAN HE HAD TO MAKE THAT CONCLUSION

6 THE COURT: ALL RIGHT.

7 ON THIS ISSUE, I APPRECIATE THE LOGIC AND THE ARGUMENT, I
8 FOLLOW IT AND I'M PERSUADED BY IT IN THE ABSTRACT. BUT I DO
9 SEE PRETTY CLEAR CASE LAW FROM THE FEDERAL CIRCUIT THAT YOU
10 DON'T NEED TO HAVE A SINGLE DOCUMENT OR DOCUMENTS INCORPORATED
11 BY REFERENCE UNDER PROVE UP CONCEPTION.

12 WITH THAT BASIS ALONE, I'M REFERRING TO THE PRICE V. SYMSEK
13 CASE. I'M GOING TO DENY THE MOTION AND ALLOW THE TESTIMONY
14 FROM EACH OF CLARKE AND ROBERTSON.

15 LET'S TURN TO THE MOTION FOR ADVERSE INFERENCE. AND I
16 WANT TO, MR. FUISZ I WANT TO BEGIN WITH YOU ON THIS ONE THAT I
17 HAVE ALREADY THIS AFTERNOON.

18 I'M TROUBLED BY THE ALLEGATIONS THAT YOU RAISE IN THE
19 PAPERS SO I WOULD LIKE TO BETTER UNDERSTAND EXACTLY HOW YOU
20 CAME TO LEARN OF THESE ALLEGATIONS AND WHAT YOU WOULD LIKE TO
21 DO. DR. FUISZ, DO YOU WANT TO ADDRESS THIS? I DIDN'T MEAN TO
22 EXCLUDE YOU.

23 MR. RICHARD FUISZ: DO YOU WANT TO HEAR WHAT PORTION
24 OF THIS, YOUR HONOR?

25 THE COURT: I'M JUST PARTICULARLY -- AS I UNDERSTAND

1 IT WHAT WE EVER TALKING ABOUT HERE ARE SOME FAIRLY SERIOUS
2 CHARGES THAT WITNESSES WERE DISCOURAGED FROM TESTIFYING AND
3 THAT YOU CAME TO LEARN ABOUT THIS AS A RESULT OF SOME E-MAILS
4 FROM THIS GENTLEMAN'S WIDOW.

5 MR. RICHARD FUISZ: THEY WEREN'T E-MAILS.

6 WHAT OCCURRED WAS I WAS CURIOUS IF HE HAD A WIFE. AND I
7 CAME UPON THIS -- IF I'M A LITTLE LENGTHY, STOP ME.

8 LOOK, MY WHOLE CAREER I'VE KNOWN INVENTORS. ALEX
9 ZAFFARONI WAS A FRIEND, PEOPLE FROM THE UNIVERSITY OF
10 MISSISSIPPI ARE FRIENDS, ZYDIS, WHO IS A COMPETITOR, ARE
11 FRIENDS.

12 I ALWAYS FIND THAT INVENTORS, REAL INVENTORS, ARE
13 CORDIAL. I WOULD SIT TWICE A YEAR WITH ALEX ZAFFARONI IN HIS
14 OFFICE, AND EVEN THOUGH WE WERE COMPETITORS, WE RESPECTED EACH
15 OTHER.

16 AND SO I ALWAYS FELT IAN GIBBONS WAS REALLY AN INVENTOR,
17 NOT A FAUX INVENTOR, HE WAS A REAL INVENTOR. AND I WAS JUST
18 CURIOUS BECAUSE USUALLY REAL INVENTORS ARE PRETTY HONEST
19 PEOPLE.

20 AND SO I LOOKED FOR HIS WIFE. I CALLED AND LEFT WORD
21 THAT I HAD CALLED AND SHE CALLED ME BACK. AND THEN THERE CAME
22 OUT AN OUTPOURING OF SOMETHING I DIDN'T EXPECT.

23 AND SHE TOLD ME ON HER OWN VERBALLY, AND I'M NOT TRYING
24 TO EMBARRASS ANYBODY IN THE COURTROOM, BUT THAT ELIZABETH
25 HOLMES IS A LIAR, THAT SHE'S A SOCIOPATH, AND THAT THE WHOLE

1 PROBLEM WITH HER HUSBAND BASICALLY WAS THEY WOULDN'T LET HIM
2 TESTIFY IN OUR CASE.

3 AND SHE WENT ON AND ON. AND THEN SHE BEGAN SUPPLYING
4 DOCUMENTS TO ME. THE ONE DOCUMENT WAS FROM HER ATTORNEY, IT
5 TURNED OUT WHICH WAS DELETED, FROM THE THERANOS ATTORNEY. AND
6 THEN SHE TOLD ME THAT SHE HAS 5 OR 6 OTHER DOCUMENTS.

7 SHE SAID DR. FUISZ, IF YOU THINK THAT DOCUMENT WHICH I
8 HAD DELETED, WAS BAD, YOU SHOULD HAVE SEEN THE OTHER DIRECTIVES
9 THAT MS. HOLMES HAD HER ATTORNEYS WRITE.

10 AND THE REASON THEY DIDN'T WANT HIM TO TESTIFY WAS
11 BECAUSE HE DIDN'T THINK SHE INVENTED A THING. AND THEN SHE
12 WENT ON TO TELL ME VERBALLY, AND SOME OF IT MADE ITS WAY INTO
13 E-MAILS, OF HOW HE WENT TO CHANNING ROBERTSON, TO BASICALLY SAY
14 HE DIDN'T LIKE THE CONDUCT OF HOW SHE WAS RUNNING THE COMPANY
15 AND THAT SHE WAS VERY ARBITRARY AND SHE WAS NAMING INVENTORS
16 WHETHER THEY WERE INVENTORS OR NOT. AND THAT CHANNING
17 DOUBLE-CROSSED HIM AND WENT TO HER.

18 THEN I'M NOT GOING TO REPEAT THE REST, BUT SHE GAVE A
19 VERY INTERESTING REASON WHY AND IT HAD TO DO WITH THINGS I
20 GUESS WE ARE NOT SUPPOSED TO DISCUSS IN THE COURTROOM RELATIVE
21 TO CHANNING AND MS. HOLMES.

22 AND IT WAS INTERESTING TO ME BECAUSE IT FIT THE SAME
23 THING PHYLLIS GARDENER TOLD ME. IT WAS A PHYSICIAN ON THE
24 ADVISORY BOARD WHO SAID, IT'S IN SOME OF THE E-MAILS, BUT
25 VERBALLY MS. HOLMES IS A LIAR, SHE'S A THIEF, SHE MAKES UP

1 THINGS, SHE'S A SOCIOPATH, AND THAT SHE ONLY HAS OLD MEN AROUND
2 HER.

3 AND AGAIN, I'M NOT GOING TO GO INTO WHAT WAS SAID. AND
4 WHAT YOU ARE SEEING IS I WOULD SAY, ONE-EIGHTH OF WHAT WAS
5 CONVEYED BY HER IN PERSON.

6 AND THEN, YOU KNOW --

7 THE COURT: DR. FUISZ, CAN I ASK YOU, I APOLOGIZE,
8 BUT I WANT TO MAKE SURE I APPRECIATE WHAT YOU ARE TELLING ME.

9 IS IT CORRECT FOR ME TO UNDERSTAND THAT AT SOME POINT
10 YOUR ATTORNEYS AT THE TIME WERE ASKING TO DEPOSE MR. GIBBONS?

11 MR. RICHARD FUISZ: NO, BECAUSE DISCOVERY WAS OVER.

12 THE COURT: THIS WAS ALL AFTER DISCOVERY.

13 MR. RICHARD FUISZ: IT WAS ALL AFTER DISCOVERY THAT
14 THESE THINGS WERE FOUND OUT.

15 AND I THINK THAT'S WHY MY SON, ONE OF THE THINGS HE ASKED
16 WAS TO EXTEND DISCOVERY BECAUSE SHE WAS MORE THAN WILLING TO
17 TESTIFY TO -- SHE'S AN ATTORNEY IN CALIFORNIA AND SHE
18 MAINTAINED, YOU KNOW, VERBALLY PRETTY STRONGLY THAT SHE FELT HE
19 WAS KILLED BY THEM BECAUSE HE WAS UNDER SUCH PRESSURE.

20 AND IT'S OBVIOUS ON ONE OF THE E-MAILS BECAUSE YOU CAN
21 SEE HE'S AT WORK, HERE'S A MAN WHO IS AT WORK WHO WAS SO
22 CERTIFIED THAT HE TRANSFERS IT TO HIS PERSONAL E-MAIL, SENDS IT
23 TO HIS WIFE, HIS WIFE AND SAYS PRINT IT TONIGHT.

24 HE OBVIOUSLY FELT THE PRESSURE ON HIM WAS SO OBNOXIOUS,
25 AND HONESTLY I THINK IT GOES TO THE WHOLE MATTER OF THE CASE.

1 I MEAN, AS TO WHO INVENTED WHAT.

2 AS I SAY, I TRUSTED REAL INVENTORS. I HOPE THAT'S
3 HELPFUL.

4 THE COURT: ALL RIGHT. THANK YOU.

5 MR. UNDERHILL, DO YOU WANT TO RESPOND?

6 MR. UNDERHILL: I SURE DO.

7 THE COURT: AND AS PART OF YOUR RESPONSE I WOULD LIKE
8 TO GET YOUR TAKE ON THE SEQUENCE OF EVENTS HERE.

9 AS I READ THE PAPERS, I UNDERSTOOD THERE WAS A REQUEST TO
10 DEPOSE THIS GENTLEMAN. THERE WAS SOME CHALLENGE IN GETTING HIM
11 SCHEDULED AND UNFORTUNATELY HE TOOK ILL AND PASSED AWAY BEFORE
12 THE DEPOSITION WAS UNDERTAKEN.

13 MR. UNDERHILL: YOU ARE CORRECT. AND IT WAS DURING
14 DISCOVERY. WE HAVE THE EXACT DATES IN OUR PAPERS.

15 I BELIEVE THAT THERE WAS AN INITIAL REQUEST FOR
16 DEPOSITION. AT THAT TIME THE PARTIES WERE GOING BACK AND FORTH
17 ON A MORE COMPREHENSIVE DEPOSITION SCHEDULE. THERE WERE
18 VARIOUS ISSUES, DR. FUISZ REFUSED TO BE DEPOSED BEFORE OR
19 SIMULTANEOUS WITH ELIZABETH HOLMES. THERE WERE OTHER SIMILAR
20 TYPE ISSUES.

21 THEN OPPOSING COUNSEL DID NOTICE IAN GIBBONS' DEPOSITION,
22 I BELIEVE THE TIME LAPSE, THIS IS IN OUR PAPERS, SO IF I'M
23 WRONG HERE, IT'S RIGHT IN THE PAPERS, I THINK IT WAS ABOUT FIVE
24 WEEKS FROM WHEN THEY INITIALLY ASKED FOR IT TO WHEN THEY
25 FINALLY NOTICED IT TO THE NOTICED DATE.

1 BEFORE THE NOTICED DATE HE DIED. WE HAVE ENORMOUS
2 PROBLEMS WITH THIS MOTION. IF MRS. GIBBONS IS SO WILLING TO
3 TESTIFY ABOUT THIS, WHERE'S A SWORN STATEMENT? THEY ASKED HER
4 FOR A SWORN STATEMENT AND SHE APPARENTLY REFUSED TO PROVIDE IT.

5 THE THIRD THING HERE IS THERE'S NO SECRET SHE DOES NOT
6 LIKE ELIZABETH. SHE DESCRIBES HER, APOLOGIES TO MY CLIENT WHO
7 IS IN THE COURTROOM, AS NOT VERY BRIGHT, HER PRESENTATIONS MADE
8 MRS. GIBBONS CRINGE, ALL SORTS OF THINGS. OKAY.

9 THEN WE GET INTO JUST THE MALICIOUS, YOU KNOW, DISGUSTING
10 STUFF OF OH, YOU KNOW, SHE LIKES HAVING OLD MEN AROUND HERE.
11 WHAT THE HECK IS THAT SUPPOSED TO MEAN? THIS THING WITH
12 RESPECT TO CHANNING AND THE CRUDE SEXUAL REFERENCES IN THE
13 E-MAIL, IT'S RIDICULOUS, IT NEVER HAPPENED. IT'S BAZAAR. AND
14 IT JUST GOES TO SHOW WHERE THIS LADY IS COMING FROM.

15 NOW THERE'S NO DOUBT THAT IAN GIBBONS HAD A VERY
16 DIFFICULT END OF LIFE. AND I TRY TO BE DISCREET ABOUT IT.
17 WE'VE LAID IT OUT IN THE PAPERS. HE WAS DEALING WITH A LOT OF
18 ISSUES THAT HAD ABSOLUTELY NOTHING TO DO WITH THERANOS.

19 YOU KNOW, THIS IDEA THAT HE CAME HOME AND SAID OH,
20 ELIZABETH IS LYING ABOUT INVENTORSHIP AND SUPPOSEDLY NINE
21 MONTHS LATER SHE RELAYS THIS TO OUR LITIGATION ADVERSARIES, IS
22 JUST ABSURD.

23 AND THE KEY THING HERE, I MEAN, UTTERLY, HOW COULD WE
24 POSSIBLY EVEN BE HERE OVER THIS, IS WE ASKED FOR ALL OF THE
25 CORRESPONDENCE BETWEEN THE FUISZES AND MRS. GIBBONS. THEY

1 ACTUALLY GAVE US A LITTLE BIT MORE THAN WHAT THEY GAVE THE
2 COURT BUT THEN THEY ARE HOLDING BACK ON EVERYTHING ELSE.

3 WHAT WE CAN TELL BY LOOKING AT IT IS SHE WAS SIGNING UP
4 FOR WHATEVER DR. FUISZ TOLD HER. DR. FUISZ TELLS HER, WHICH IS
5 ONE OF THEIR THEMES IN THE CASE, OH IT LOOKS TO ME LIKE
6 THERANOS WAS WORKING ON BIG PHARMA DRUG TILES, NOT CLINICAL, IS
7 THAT YOUR UNDERSTANDING.

8 AND SHE RESPONDS WITH YES, THEY WEREN'T FOCUSED ON
9 CLINICAL, BUT OF COURSE IAN COULDN'T TALK TO ME ABOUT THEIR
10 BUSINESS SO I DON'T REALLY KNOW, BUT YEAH YOU ARE RIGHT.

11 AND SHE CONTINUALLY, IF YOU LOOK AT THE E-MAIL
12 CORRESPONDENCE CLOSELY, SHE SIGNS UP FOR WHATEVER THEY TELL
13 HER. THE WOMAN DOES HAVE AN AX TO GRIND. I'VE NEVER MET HER,
14 SHE OBVIOUSLY HATES OUR CEO. AND YOU KNOW, IT JUST IS NOT EVEN
15 REMOTELY GETTING OFF THE GROUND HERE. IT'S NOT CREDIBLE ON ITS
16 FACE. AND THERE'S NO SWORN TESTIMONY, THIS IS A COMPLETE SIDE
17 SHOW.

18 I THINK IT'S BROUGHT TO EMBARRASS OUR CEO. FROM THE
19 BEGINNING OF THIS CASE THE FUISZ'S HAVE HAD THIS INTEREST IN
20 HER PERSONAL LIFE. AND THEY CONTINUALLY HAVE TRIED TO GET INTO
21 WHO HER PERSONAL RELATIONSHIPS ARE, YOU KNOW, HISTORICAL.
22 THEY -- THEN THE CHANNING ROBERTSON DEPOSITION THEY EXPLORE
23 THEIR THEORY THAT SHE SOMEHOW IS CARRYING ON WITH A MARRIED MAN
24 WHO IS TWICE HER AGE.

25 IT'S JUST, AT SOME POINT THEY NEED TO GIVE IT A BREAK.

1 WE'VE GOT TO ACTUALLY TRY IT ON THE ISSUES. AND THE IDEA THAT
2 IAN WAS HARASSED INTO NOT GIVING A DEPOSITION, IS JUST NOT
3 TRUE. THERE WAS A GREAT DEAL OF CONCERN ABOUT WHETHER OR NOT
4 HE WAS PHYSICALLY AND MENTALLY CAPABLE OF EVEN GIVING A
5 DEPOSITION.

6 NOW ON THIS LETTER THAT COUNSEL PROVIDED THAT THERANOS
7 COUNSEL PROVIDED TO DR. GIBBONS AND THEN MRS. GIBBONS WHO IS A
8 LAWYER AND CERTAINLY WOULD HAVE KNOWN BETTER PROVIDED IT TO THE
9 FUISZ'S, ONE OF WHOM IS A LAWYER AND SHOULD HAVE KNOWN BETTER,
10 AND THEY USED IT ON THIS MOTION.

11 WE HAVE NO PROBLEM AT ALL WITH THE COURT REVIEWING THAT
12 IN CAMERA. I'VE SEEN IT. IT'S PERFECTLY APPROPRIATE. IT'S A,
13 YOU KNOW, IF YOU -- IF THERE'S A HEALTH ISSUE, THIS IS
14 SOMETHING THAT YOUR DOCTOR COULD SAY THAT WOULD BEAR ON YOUR
15 GIVING A DEPOSITION.

16 AND LASTLY, THE WHOLE PREMISE THAT DR. GIBBONS WAS ON
17 THEIR SIDE IS JUST WRONG. AND YOU KNOW, I BELIEVE FROM TALKING
18 TO OTHER WITNESSES AT THE COMPANY, THAT HE THOUGHT THE FUISZES
19 WERE A BUNCH OF THIEVES. AND IF HE HAD GIVEN A DEPOSITION IN
20 THIS CASE, THERANOS BELIEVES HE WOULD HAVE SAID, THE FUISZES
21 WERE A BUNCH OF THIEVES.

22 SO FOR THERE TO BE THIS ATTEMPT TO SIDE TRACK THE
23 LITIGATION FROM THE FACTS WITH THESE SCANDALOUS AND UNSAVORY
24 ALLEGATIONS, WE THINK IS HIGHLY IMPROPER.

25 THE COURT: ALL RIGHT.

1 MR. FUISZ, DO YOU WANT TO RESPOND?

2 MR. JOE FUISZ: LISTEN, MR. UNDERHILL IS DOING WHAT A
3 GOOD ADVOCATE WOULD DO WHICH IS TO FOCUS ON SOME WORDS THAT
4 MRS. GIBBONS USED WHICH FRANKLY CAN MEAN A LOT OF THINGS, NOT
5 NECESSARILY SOMETHING UNSAVORY, IF THAT MAKES ANY SENSE. I
6 CERTAINLY DID NOT TAKE THAT AS A LITERAL ACQUISITION AGAINST
7 THE PLAINTIFF. CERTAINLY THAT WAS MY READING OF IT, NUMBER
8 ONE.

9 TWO, LOOK, MR. UNDERHILL LOVES TO SAY WE DIDN'T GO OUT
10 WITH THE CORRESPONDENCE. BUT WE OFFERED, WE SAID WE WILL
11 PROVIDE EVERYTHING IN CAMERA TO THE COURT, ALL OUR
12 COMMUNICATIONS WITH MRS. GIBBONS TO SEE IF WE WERE COACHED, BUT
13 WE WOULD LIKE YOU GUYS TO MAKE A SIMILAR PROFFER IF THINGS YOU
14 HAVE HELD BACK ARE PRIVILEGED WITH GIBBONS AND PERHAPS THAT
15 WOULD BE PROBATIVE OF SOMETHING OR NOT AS THE CASE MAY BE.

16 THAT'S ONE THING I THOUGHT WAS REASONABLE. WE HAVE A
17 TRIAL HERE, AND I DON'T REALLY EXPECT YOUR HONOR TO REOPEN
18 DISCOVERY, SO THAT WAS ONE POSSIBLE SOLUTION I THOUGHT OF.

19 THE OTHER THING WOULD BE IF YOUR HONOR WOULD ALLOW US TO
20 CALL DR. GARDENER AND MRS. GIBBONS AS WITNESSES IN THE CASE. I
21 KNOW IT'S AFTER FACT DISCOVERY, I KNOW IT WAS IT WOULD BE A
22 SPECIAL ALLOWANCE, BUT I THINK IT WOULD IN THE INTEREST OF
23 JUSTICE ALLOW THIS TO BE PURSUED.

24 I DON'T FRANKLY KNOW, LOOK, MRS. GIBBONS IS A WIDOW, WHO
25 IS TO SAY, BUT I THINK THAT WOULD BE PERHAPS A REASONABLE

1 RESOLUTION.

2 THE COURT: GO AHEAD, DR. FUISZ.

3 MR. RICHARD FUISZ: MR. UNDERHILL CONTINUALLY
4 MINIMIZES, HE'S GOT CROWN JEWELS, HE'S GOT ALL THESE STORIES.
5 THERE WAS NOT ONE LETTER. SHE SAID THERE WERE 4 OR 5 LETTERS,
6 EACH ONE MORE STRIDENT FROM THE ATTORNEYS.

7 WHY DOESN'T HE TURN THOSE OVER? IS THAT NOT RELEVANT? AND
8 SUDDENLY IN HIS DEATH, MR. UNDERHILL SEEMS TO KNOW HOW HE WOULD
9 TESTIFY, WHEN HIS WIFE SAID HE WOULD ABSOLUTELY NOT TESTIFY ON
10 THERANOS'S BEHALF.

11 THE COURT: ALL RIGHT.

12 MR. UNDERHILL, DO YOU WANT TO OFFER A FINAL WORD ON THIS
13 ONE?

14 MR. UNDERHILL: SURE.

15 WE STILL HAVEN'T WORD WHY THERE'S NO SWORN DECLARATION.
16 SHE'S SUPPOSEDLY WILLING READY AND ABLE TO TESTIFY BUT WON'T
17 GIVE HIM A SWORN DECLARATION.

18 SECOND, I JUST WANT TO SAY THIS THING ABOUT IAN GIBBONS
19 BEING FIRED OR REHIRED, THEY SEEM INTENSELY CURIOUS ABOUT THAT
20 SO LET ME BE CLEAR.

21 YES, HE WAS FIRED AND REHIRED, IT WAS IN 2010, HAD
22 NOTHING TO DO WITH THIS. AND YES, HE GOT FIRED BECAUSE
23 CHANNING ROBERTSON WENT TO THE COMPANY AND REPORTED WHAT HE HAD
24 SAID. SO YES HE WAS MAD AT CHANNING ROBERTSON. THERANOS
25 DOESN'T THINK CHANNING ROBERTSON DID ANYTHING WRONG, HE DID

1 EXACTLY WHAT HE WAS SUPPOSED TO DO.

2 SO WE ARE WILLING TO STIPULATE THAT IAN GIBBONS WAS MAD
3 AT CHANNING ROBERTSON.

4 THE COURT: ALL RIGHT.

5 WHILE WE HAVE TOUCHED UPON A NUMBER OF ISSUES HERE,
6 THERE'S A FAIRLY STRAIGHTFORWARD ONE THAT'S ACTUALLY BEFORE ME
7 WHICH IS WHETHER IT PROVIDES SOME TYPE OF ADVERSE INSTRUCTION
8 AS A RESULT OF WHAT'S BEEN IDENTIFIED TO THE COURT.

9 THAT SPECIFIC REQUEST IS DENIED. I DON'T HAVE EVIDENCE
10 BEFORE ME THAT WOULD ALLOW ME TO TAKE THAT STEP. AND ON THAT
11 BASIS ALONE I'M GOING TO DENY THE MOTION.

12 AS FOR OPENING DISCOVERY, I THINK EACH SIDE CAN PROBABLY
13 READ ME ON THAT ONE, NOT OPENING DISCOVERY. WE ARE GOING TO
14 GET THIS CASE TRIED AND GET THIS DISPUTE RESOLVED ONE WAY OR
15 THE OTHER IN JUST A COUPLE OF DAYS.

16 SO ON THAT BASIS THE MOTION IS DENIED. LET'S MOVE
17 FORWARD.

18 MS. ANDERSON, I WOULD LIKE TO HEAR FROM YOU ON THE
19 DESIGNATIONS YOU TOUCHED UPON A FEW OF THE ISSUES.

20 THE COURT: I DON'T KNOW IF WE DO, PERHAPS WE CAN
21 TALK ABOUT THIS IN THE ABSTRACT WITHOUT GETTING INTO THE
22 SPECIFICS BUT IF WE NEED THE SPECIFICS I WILL TAKE WHATEVER
23 STEPS WE NEED TO.

24 GO AHEAD, MS. ANDERSON, I WOULD LIKE TO UNDERSTAND BETTER
25 WHAT YOU HAVE FOUND AND WHAT SPECIFICALLY YOU WANT REDESIGNATED

1 THAT HASN'T BEEN REDESIGNATED.

2 MS. ANDERSON: WELL, YOUR HONOR, I THINK THE
3 RELEVANCE HERE HAS A LOT TO DO WITH, I'M NOT A PATENT LAWYER,
4 I'M IN A STOCK AND BROAD BRUSH TERMS.

5 THE ISSUES OF INVENTORSHIP AND CONCEPTION ARE TOUCHED UPON
6 IN REDACTIONS THAT EXIST, THE DATE UPON WHICH MR. KEMP STARTED
7 WITH THERANOS IS A VERY RELEVANT ITEM. ON PAGE 14 IT STARTS
8 THE TIMELINE OF WHEN HE BEGAN.

9 IF YOU CONTINUE ON DOWN, IT SHOWS THE CAPABILITIES ALL
10 RELEVANT INFORMATION FOR THE JURY TO ASSESS INVENTORSHIP AND
11 WHEN CONCEPTION OCCURRED. THE TYPE OF PROTOCOLS THAT WERE USED
12 AND THE MOVEMENT OF DATA ARE KEY ISSUES AS I SEE IT AS I'M
13 READING THE PARTY'S PAPERS, IN HOW THESE DEVICES WORK. AND
14 WHAT EXACTLY IT WAS THAT THERANOS WAS DOING AT THE TIME.

15 BECAUSE THIS INFORMATION IS SO INCREDIBLY DATED AT THIS
16 POINT, I DON'T SEE HOW THERE IS AS ITS REPRESENTED IN THE
17 THERANOS PAPERS, SOMETHING HASN'T BEEN DISCLOSED.

18 THESE TECHNOLOGIES HAVE BEEN AROUND FOR A CONSIDERABLE
19 PERIOD OF TIME. AND IN 2014 A LOT OF THIS STUFF IS IN WORKING
20 DEVICES. WHEN YOU ARE TALKING ABOUT DEVICES -- I TOUCHED UPON
21 EARLIER THE DISCUSSION OF THE VARIOUS PROVISIONAL ASSERTATIONS
22 AND THE QUESTIONS THAT WERE ASKED OF MR. KEMP REGARDING WHAT
23 HIS PARTICIPATION WAS AND WHAT THE PROVISIONAL DID.

24 AGAIN, I THINK THE COURT HAS ALREADY RULED ON THAT. BUT
25 JUST OUT OF AN ABUNDANCE OF CAUTION THESE PAGES START ON PAGE

1 35 OF THE DEPOSITION AND CONTINUE, SOME OF THIS HAS BEEN OPENED
2 UP, SOME OF IT HASN'T. AND I JUST DON'T SEE THIS IS A PIECE
3 THAT'S EVEN ATTACHED TO THE COMPLAINT AS BEING ESTABLISHING A
4 DATE OF INVESTOR SHIP, HOW THEY CAN DENY PROVIDING THIS TO THE
5 DEFENDANTS AND ALLOW THE JURY TO MAKE THE NECESSARY DECISIONS
6 THAT THEY HAVE TO MAKE HERE

7 AND I JUST WANT TO STEP BACK FOR A MOMENT. I'M TALKING
8 ABOUT RELEVANCE, BUT THE CASE LAW FROM BROWN BAG CLEARLY
9 DOESN'T REQUIRE THAT.

10 HERE WE ARE REALLY TALKING ABOUT WHAT THE PARTIES AGREE
11 TO IN THE PROTECTIVE ORDER WHICH WAS EXTREMELY SENSITIVE,
12 CONFIDENTIAL INFORMATION, THE DISCLOSURE OF WHICH WAS TO
13 ANOTHER PARTY OR NONPARTY WOULD CREATE SUBSTANTIAL AND SERIOUS
14 HARM, COULD NOT BE AVOIDED BY UNLESS RESTRICTED --

15 SO ON ONE HAND THE CLIENTS TO ALLOW THE PARTIES HERE TO
16 READ THE INFORMATION THAT MR. KEMP IS TESTIFYING ABOUT WHAT HIS
17 PARTICIPATION WAS ON, FOR INSTANCE PROVISIONAL APPLICATION FOR
18 192, AND ON THE OTHER HAND REDACTED IT.

19 THE COURT: MS. ANDERSON, WE ARE HAVING A LITTLE HARD
20 TIME. IF YOU COULD KEEP YOUR VOICE UP, THAT WOULD HELP US.

21 MS. ANDERSON: AND REDACTED IT HERE IN THE PAGES OF
22 THE DEPOSITION.

23 THE COURT: ALL RIGHT.

24 MS. ANDERSON: WHAT WAS UNIQUE IN THE BAR CODE.

25 AND I DO NEED TO DISCUSS THE E-MAILS AS WELL, YOUR HONOR.

1 IF THE COURT -- DOES THE COURT PLAN ON LOOKING AT THESE
2 REDACTED PAGES AND LOOKING AT THIS FROM A RELEVANT STANDPOINT
3 AS WELL AS WHETHER OR NOT THE PARTIES SHOULD USE THIS
4 INFORMATION FOR CROSS-EXAMINATION PURPOSES, I THINK THAT'S
5 NECESSARY GIVEN WHAT MR. UNDERHILL HAS DESCRIBED AS WHAT WOULD
6 BE DONE ON THE WITNESS STAND.

7 I CAN TAKE THE COURT'S TIME NOW AND DISCUSS IT OR DO IT,
8 HAVE THE COURT DO THIS IN CAMERA.

9 BUT THE E-MAILS IN PARTICULAR, I THINK THE THERANOS HAS
10 MISUNDERSTOOD WHAT IT WAS THAT I REQUESTED. I DID NOT REQUEST
11 FOR THE ATTACHMENTS TO BE PROVIDED AT THE VARIOUS WRATHS OF THE
12 APPLICATIONS THAT WERE SUBMITTED. BUT THE E-MAILS VERIFYING
13 THE COMMUNICATIONS OCCURRED THAT DUE TO THE PASSAGE OF TIME,
14 MR. BOMMI BOMMANNAN COULD NOT RECALL OCCURRED.

15 THE KEY TO THE FUISZ'S DEFENSE AS I SEE THE PAPERS
16 WRITTEN, TO BE ABLE TO PRESENT THE DRAFTING THAT BOMMI
17 BOMMANNAN HAD ENGAGED IN. AND AS IS FAIRLY EVIDENT ON THE FACE
18 OF THE E-MAIL BECAUSE IT'S SAYING ATTACHED TO PROVISIONAL
19 NUMBER X, Y AND Z, AND SENDING IT BACK AND FORTH BETWEEN MS.
20 HOLMES AND MR. BOMMANNAN.

21 AND THAT WOULD BE CONSISTENT AND COOPERATIVE OF WHAT THE
22 DEFENSE IS PRESENTING WITH REGARD TO THE AUTHORSHIP AND THE
23 WRITING OF THE PATENT APPLICATION ITSELF.

24 THERE'S EIGHT E-MAILS THAT WERE OUT LINED. I WOULD
25 DIRECT THE COURT'S ATTENTION PARTICULARLY TO THERANOS NUMBER

1 3031, 2436, 165, 3187, 3188, 3189, 3217 AND LASTLY, 3368.

2 AND THE DATES ARE IMPORTANT ON THESE E-MAILS BECAUSE IT'S
3 TALKING ABOUT DECEMBER 2005. GIVES THE JURY A VIEW OF WHAT IT
4 WAS THAT WAS OCCURRING BACK THEN AND WHEN THE DRAFT OF THE
5 APPLICATION WAS READY TO BE FILED, CRITICAL DATES AS I SEE IT
6 IN THIS CASE.

7 THE COURT: ALL RIGHT. I THINK I UNDERSTAND YOUR
8 POSITION. I MAY HAVE A FEW QUESTIONS FOR YOU AFTER I'VE HEARD
9 FROM THERANOS.

10 MR. JAY, DO YOU WANT TO PROCEED?

11 MR. JAY: SURE.

12 SO YOUR HONOR, WE THINK WE MET WITH YOUR HONOR ON
13 FEBRUARY 12TH A FEW WEEKS AGO.

14 AFTER THAT WE WENT BACK IT A NUMBER OF DIFFERENT
15 DEPOSITION TRANSCRIPTS INCLUDING MR. KEMP'S TRANSCRIPT AND DOWN
16 DESIGNATED A NUMBER OF PORTIONS OF HIS TRANSCRIPT.

17 THE COURT: THEY ARE STILL CONFIDENTIAL JUST NOT AEO.

18 MR. JAY: CORRECT, WHICH THE FUISZ'S CONCEDE.

19 THEN SUBSEQUENT TO THAT, LAST WEEK THE DAY BEFORE I THINK
20 THE FUISZ'S FILED, MS. ANDERSON FILED HER MOTION ON TUESDAY
21 AROUND 5 OR 6:00, THE EVENING BEFORE SHE SENT US A LIST OF
22 PORTIONS OF MR. KEMP'S DEPOSITION THAT SHE WANTED US TO
23 RECONSIDER DOWN DESIGNATING. WE DIDN'T HAVE ENOUGH TIME TO DO
24 SO BEFORE SHE FILED THEIR MOTION.

25 SHE FILED THEIR MOTION BUT WE ACTUALLY WENT BACK AGAIN TO

1 MR. KEMP'S TRANSCRIPT AND FURTHER DOWN DESIGNATED A SUBSTANTIAL
2 PORTION OF HIS TRANSCRIPT INCLUDING THE PORTIONS OF THE
3 TRANSCRIPT THAT MS. ANDERSON WAS TALKING ABOUT NOW.

4 FOR INSTANCE, SHE WAS TALKING ABOUT THINGS SUCH AS
5 BACKGROUND AND START DATE AND THINGS OF THAT SORT. AND THOSE
6 THINGS ARE ALL NOW DESIGNATED CONFIDENTIAL. I SENT AN E-MAIL
7 TO MS. ANDERSON ON MONDAY EVENING LISTING ALL OF THE PORTIONS
8 THAT WE OFFICIALLY DOWN DESIGNATED TO CONFIDENTIAL.

9 THE PORTION THAT IS REMAIN AEO ARE CERTAIN PORTIONS OF
10 MR. KEMP'S TRANSCRIPT THAT DO CONTAIN THE MOST SENSITIVE OF
11 THERANOS'S INFORMATION THAT WE BELIEVE IN THE HANDS OF THE
12 FUISZ'S COULD POTENTIALLY CAUSE THERANOS SIGNIFICANT HARM.

13 MS. ANDERSON MENTIONED THE TIMING OF ALL OF THIS. I
14 THINK WE EXPLAINED IN OUR PAPERS THE REASON WHY EVEN THOUGH
15 SOME OF THIS INFORMATION IS FROM THE PERIOD OF 2004 TO 2006 IT
16 COULD STILL BE HARMFUL NOW BECAUSE, IT TALKS ABOUT CERTAIN
17 UNRELEASED PRODUCTS THAT STILL HAVE NOT NECESSARILY MADE THEIR
18 WAY INTO THE PUBLIC'S VIEW AT THIS POINT.

19 AS FAR AS THE DOCUMENTS, THE EIGHT E-MAILS THAT THEY
20 IDENTIFIED IN THEIR MOTION, SEVEN OF THOSE E-MAILS ARE BETWEEN
21 THERANOS AND MR. BOMMANNAN AND ONE E-MAIL IS BETWEEN THERANOS
22 AND THOMAS HOGUE, AN ATTORNEY AT MCDERMOTT.

23 THOSE E-MAILS CONTAIN CERTAIN INFORMATION AGAIN THAT IS
24 VERY SENSITIVE TO THERANOS. MS. ANDERSON WAS TALKING ABOUT
25 THAT THEY WOULD WANT THOSE E-MAILS TO SHOW THAT IT WAS INDEED

1 MR. BOMMANNAN THAT DRAFTED THE FOUR PROVISIONAL APPLICATIONS OR
2 THE TIMING OF THAT. WE WOULD BE GLAD TO STIPULATE THAT MR.
3 BOMMANNAN DID THE DRAFTING, WE WOULD BE GLAD TO STIPULATE TO
4 THE DATES IN WHICH HE SENT THOSE PROVISIONALS TO MR. HOGUE AND
5 MCDERMOTT, THAT'S NOT AN ISSUE. BUT WE CONTINUE TO BELIEVE
6 THOSE DOCUMENTS ARE PROPERLY DESIGNATED AEO.

7 THE COURT: OKAY.

8 ON THIS ISSUE, LET ME SUGGEST THIS, RATHER THAN CONSUME
9 OUR PRECIOUS TIME HERE THIS AFTERNOON ADDRESSING EACH ITEM IN
10 OPEN COURT AND IN FURTHER DETAIL, I'M HAPPY TO TAKE A LOOK AT
11 THE TRANSCRIPT, TAKE A LOOK AT THE E-MAILS AND MAKE A DECISION
12 IN CHAMBERS.

13 SO I WILL TAKE THIS ONE UNDER ADVISEMENT AND I WILL
14 INCLUDE A MORE DETAILED RULING IN THE FORMAL ORDER I WILL ISSUE
15 AFTER THIS HEARING.

16 MR. JAY: YOUR HONOR, QUICKLY ONE THING.

17 THE COURT: YES.

18 MR. JAY: I MENTIONED THAT WE SAID ON MONDAY A LIST
19 OF THE PORTIONS OF MR. KEMP'S TRANSCRIPT THAT WE DOWN
20 DESIGNATED, AND I BELIEVE IT'S A VERY EARLY FOOTNOTE IN OUR
21 BRIEF WE FILED THE OTHER DAY, WE LIST THE REMAINDER OF
22 MR. KEMP'S TRANSCRIPT THAT IS STILL DESIGNATED AEO.

23 THE COURT: SO, I'M SORRY, AND IS THIS, ARE YOU
24 REFERRING TO AN IF THE NOTE IN YOUR OPPOSITION PERHAPS FOOTNOTE
25 2?

1 MR. JAY: YES, THAT IS CORRECT. THOSE ARE THE
2 PORTIONS THAT REMAIN DESIGNATED AEO.

3 THE COURT: OKAY.

4 MR. JAY: JUST TO MAKE IT EASIER FOR YOUR HONOR.

5 THE COURT: ALL RIGHT. I APPRECIATE THAT. OKAY. WE
6 WILL HUNT THOSE DOWN.

7 I ASSUME THESE ARE ALL IN THE POSTED RECORD, SO I WILL TAKE
8 IT FROM THERE.

9 ALL RIGHT. AS FOR THE LAST MOTION THAT THE FUISZ'S HAVE
10 FILED THAT'S CURRENTLY ON THE DOCKET, IT RELATES TO THE 256
11 CLAIM.

12 I HAD UNDERSTOOD THE PREDICATE FOR THAT MOTION A CONCERN
13 FROM THE FUISZ'S THAT THE PLAINTIFFS WERE NOW ASSERTING ONLY
14 THAT MS. HOLMES WAS OMITTED.

15 I THINK MR. UNDERHILL HAS CONFIRMED HERE IN COURT THEY
16 MAINTAIN THE POSITION IT WAS BOTH MS. HOLMES AND MR. KEMP.

17 SO IN LIGHT OF THAT, I THINK THE MOTION CAN BE DENIED. I
18 THINK THE PREJUDICE HAS BEEN ADDRESSED, SO I APPRECIATE THAT
19 CLARIFICATION.

20 LET'S TURN TO THE THERANOS MOTIONS WE HAVE TO ADDRESS. I
21 WOULD LIKE TO BEGIN WITH THE DAUBERT ON THE BRYAN BERGERON.

22 MR. JAY: YOUR HONOR, I THINK ALL OF OUR ARGUMENTS
23 ARE FAIRLY WELL SPELLED OUT IN THE PAPERS.

24 I DON'T BELIEVE WE HAVE SEEN, ACTUALLY, AN OPPOSITION TO
25 THIS PARTICULAR MOTION FROM THE FUISZ'S, SO I'M NOT SURE IF

1 THEY ARE INDEED ACTUALLY OPPOSING IT.

2 MR. JOE FUISZ: WE DO.

3 MR. JAY: OR NOT.

4 AND I THINK WE SAID IT VERY CLEARLY IN THE MOTION. THERE
5 ARE SYSTEMIC FLAWS THROUGHOUT DR. BERGERON'S REPORT THAT RENDER
6 HIS ENTIRE REPORT FLAWED AND EXTREMELY PREJUDICIAL.

7 THE FLAWS TOUCH ON EVERY SINGLE ASPECT OF HIS REPORT. HE
8 OFFERS AN OPINION ON DR. LEONARD'S ANALYSIS BUT HE MAKES VERY
9 CLEAR HE'S NOT A LINGUIST. HE TALKS ABOUT CERTAIN SECONDARY
10 CONSIDERATIONS.

11 HE GETS THE LAW ON THAT QUITE WRONG. HE TALKS ABOUT
12 EVIDENCE OF SIMULTANEOUS INVENTION BEING INDICATIVE OF
13 NONOBVIOUSNESS, BUT IN FACT THE LAW IS EVIDENCE OF OBVIOUSNESS.
14 AND THERE ARE A NUMBER OF OTHER THINGS OF THAT SORT. HE
15 IMPROPERLY CONSTRUES SOME OF THE TERMS CONTRARY HOW YOUR HONOR
16 CONSTRUED THE TERMS.

17 HE PROVIDES VERY CONCLUSORY OPINIONS ON OBVIOUSNESS. HE
18 SAYS -- THE OBVIOUSNESS COMBINATIONS. SAID A PERSON OF
19 ORDINARY SKILL IN THE ART WOULD NOT HAVE BEEN MOTIVATED TO
20 COMBINE THE 594 WITH CERTAIN REFERENCES BUT DOESN'T PROVIDE ANY
21 REASONING AS TO WHY THAT'S THE CASE.

22 SO BASED ON THESE FLAWS, WE BELIEVE, THAT PERSIST
23 THROUGHOUT HIS ENTIRE REPORT, WE BELIEVE DR. BERGERON SHOULD BE
24 EXCLUDED IN HIS ENTIRETY

25 THE COURT: ALL RIGHT. THANK YOU.

1 MR. FUISZ, DR. FUISZ?

2 MR. JOE FUISZ: YOUR HONOR, I KNOW I SAID I WOULD
3 TAKE ON THE SOLE RESPONSIBILITY OF THIS TRIAL, I'M SORRY I JUST
4 DIDN'T HAVE A TIME TO FILE A REPLY ON THIS.

5 A LOT OF THEIR CRITICISMS I DISAGREE WITH. THE
6 TERMINOLOGY ERROR I HAVE TO CONCEDE IS RIGHT. BUT TO ME IT
7 GOES TO WEIGHT. I THINK THESE ARE ALL THINGS HE CAN BE
8 CROSS-EXAMINED ON.

9 AND I ALSO THINK, I JUST THINK PHILOSOPHICALLY I WANT TO
10 MAKE A POINT. OF THE PUTATIVE INVESTORS, MR. KEMP, MS. HOLMES
11 THE EXPERTS, DR. CLARKE PHD, ROBERTSON PHD, I THINK IT'S VERY
12 NICE TO HEAR FROM A MEDICAL DOCTOR. BECAUSE A BIG THING IN
13 THIS CASE FOR THE JURY TO UNDERSTAND IS THE CLINICAL CONTEXT OF
14 THE USE OF THIS DEVICE, AND I THINK BERGERON HAS A LOT TO OFFER
15 SO THAT WOULD BE HELPFUL TO THE JURY IN THAT RESPECT. AND
16 AGAIN, MY APOLOGIES FOR NOT FILING A REPLY.

17 THE COURT: OKAY.

18 DR. FUISZ, WOULD YOU LIKE TO BE HEARD?

19 MR. RICHARD FUISZ: YOUR HONOR, I WOULD JUST LIKE TO
20 UNDERSCORE THAT. YOU HAVE A SITUATION HERE WHERE YOU ARE
21 DEALING WITH A MEDICAL PRODUCT TO TAKE CARE OF A PATIENT. AND
22 I'M THE ONLY PHYSICIAN, AND BERGERON IS THE ONLY PHYSICIAN. SO
23 IF YOU ELIMINATE BERG, YOU BASICALLY HAVE NO MEDICAL INPUT, YOU
24 KNOW, INTO THE MATERIAL.

25 I FIND IT VERY DISCOURAGING. I THINK IF YOU LOOK AT HIS

1 TRANSCRIPT, YES, HE HAS MADE SOME ERROR IN DEFINING A TERM.
2 THAT'S NOT REALLY WHAT HE'S AN EXPERT IN AND I THINK HIS
3 OVERALL SUMMARY IS VERY CORRECT.

4 THE 612 IS PATIENT CENTRIC AND THE PROVISIONALS ARE NOT,
5 THEY ARE DONE FOR CLINICAL TRIALS. AND I THINK HE VERY CLEARLY
6 SAW THAT AND I THINK THAT'S REALLY WHAT THEY FIND OBJECTIONABLE
7 IN BERG.

8 THE COURT: ALL RIGHT. THIS MOTION IS DENIED. BUT
9 LET ME BE CLEAR ABOUT A FEW THINGS.

10 FIRST OF ALL, ANY ERRORS IN THE REPORT ARE GOING TO BE
11 FAIR GAME FOR CROSS-EXAMINATION. I THINK WE ALL UNDERSTAND
12 THAT. AS FOR ANY MISSTATEMENTS OF LAW OR MISAPPLICATION OF
13 LAW, NOT ONLY IS THAT GOING TO BE FAIR GAME, I WILL INSTRUCT
14 THIS JURY ON THE CORRECT LAW AND I WILL PERMIT IN CLOSING
15 ARGUMENTS, I WILL PERMIT COUNSEL ON EITHER SIDE TO HIGHLIGHT
16 ANY MISAPPLICATION OF LAW THAT ANY EXPERT WITNESS MADE IN
17 REACHING HIS OR HER OPINIONS.

18 AS FOR THE CLAIM TERMS, THAT'S MY PROVINCE AS WELL, SO I
19 WILL CERTAINLY MAKE CLEAR TO THE JURY WHAT THE PROPER
20 CONSTRUCTION OF ANY DISPUTED TERM IS.

21 TO THE EXTENT ANY EXPERT WITNESS STRAYS FROM THAT, THAT'S
22 GOING TO BE FAIR GAME IN ARGUMENT.

23 FINALLY, SINCE WE'VE TOUCHED UPON THIS I WANT TO BE CLEAR
24 ABOUT ONE OTHER POINT IF I WASN'T CLEAR BEFORE, I TEND TO TAKE
25 A VERY FORMALISTIC VIEW OF WHAT EXPERTS CAN AND CANNOT DO WHILE

1 ON THE WITNESS STAND.

2 WHAT I MEAN BY THAT IS THIS, IF AN EXPERT STRAYS REALLY
3 AT ALL FROM THE REPORT, AND IT'S POINTED OUT TO ME AFTER AN
4 OBJECTION HAS BEEN MADE, I WILL GRANT -- I WILL SUSTAIN THE
5 OBJECTION AND IF IT CONTINUES I WILL POINT OUT TO THE JURY THAT
6 THE EXPERT IS DOING SOMETHING IMPROPER.

7 SO WE ARE GOING TO HAVE A VERY TIGHTLY SCRIPTED PROCEDURE
8 HERE AND I THINK THAT WILL ALSO MITIGATE AGAINST ANY UNDUE
9 HARM.

10 ALL RIGHT. LET'S TURN TO THE MOTION IN LIMINE FROM
11 THERANOS NUMBER 1, WHICH HAS TO DO WITH CONCEPTION DATES.

12 MR. JAY: YOUR HONOR, CAN I MAKE ONE CLARIFICATION?

13 THE COURT: SURE.

14 MR. JAY: YOU ARE TALKING ABOUT GENERALLY WITH
15 RESPECT TO DR. BERGERON BUT WITH RESPECT TO HIS OPINIONS ON
16 DR. LEONARD'S REPORT IS HE GOING TO BE PERMITTED TO OPINE ON
17 THAT PORTION?

18 THE COURT: HE SERVED A SUPPLEMENTAL REPORT, DIDN'T
19 HE.

20 MR. JAY: DR. BERGERON?

21 THE COURT: AM I MISTAKEN ABOUT THAT?

22 MR. JAY: WELL, HE SERVED A REBUTTAL REPORT AND IN
23 HIS REBUTTAL REPORT HIS VERY IMPORTANT OPINION IS REBUTTING
24 DR. LEONARD'S LINGUISTIC OPINION. AND I THINK HE MADE VERY
25 CLEAR IN HIS DEPOSITION THAT HE HAS NO EXPERTISE IN THIS AREA.

1 THE COURT: CROSS HIM ON THAT. THAT'S YOUR FRIEND
2 THAT'S NOT YOUR ENEMY. YOU CAN POINT THAT OUT TO THE JURY. I
3 WOULD LIKE TO HEAR WHAT THESE TWO FOLKS HAVE TO SAY ON ALL
4 THIS. WE WILL SORT THIS ALL OUT IN DUE COURSE.

5 LET'S TALK ABOUT THE MOTION IN LIMINE NUMBER ONE AND
6 CONCEPTION DATES.

7 MR. UNDERHILL: DO YOU WANT ME FIRST, YOUR HONOR?

8 THE COURT: GO AHEAD. IT'S YOUR MOTION.

9 MR. UNDERHILL: IT IS OUR MOTION AND THERE WAS NO
10 OPPOSITION SO I REALLY HAVE NOTHING TO SAY THAT'S NOT IN OUR
11 PAPERS.

12 THE COURT: ALL RIGHT. I WILL GIVE YOU A CHANCE FOR
13 REBUTTAL.

14 MR. JOE FUISZ: COULD YOU TELL ME TWO SENTENCES WHAT
15 THE MOTION IS?

16 MR. UNDERHILL: SURE.

17 YOU GUYS HAVE YOUR E-MAIL IN OCTOBER. OUR POSITION IS YOU
18 CAN'T PUT ON EVIDENCE OF CONCEPTION THAT PREDATES THAT E-MAIL
19 BECAUSE YOU HAVE NO CORROBORATING EVIDENCE.

20 MR. JOE FUISZ: AND I BELIEVE -- I'M CONFUSED ABOUT
21 IS THAT. I BELIEVE AS A MATTER OF LAW MR. UNDERHILL IS CORRECT
22 IN TERMS OF ESTABLISHING A PRIORITY DATE.

23 THAT BEING SAID, I DIDN'T WANT TO BE MUZZLED IN TERMS OF
24 OUR DESCRIPTION OF THE 612 BECAUSE I THINK IT'S THE STORY THE
25 JURY HAS TO HEAR WHETHER IT GOES TO PRIORITY OR NOT.

1 THE COURT: OKAY. I WILL PERMIT TESTIMONY THAT IS
2 GENERAL AS TO THE WORK THAT WAS BEING DONE PRIOR TO THE
3 SEPTEMBER 2005 DATE. BUT TO THE EXTENT ANY EVIDENCE IS
4 INTRODUCED THAT EVEN SNIFFS OR HINTS AT A CONCEPTION DATE PRIOR
5 TO THAT IT'S OUT. SO THE MOTION IS GRANTED ON THAT BASIS.

6 MR. UNDERHILL?

7 MR. UNDERHILL: YOUR HONOR, JUST TO CLARIFY THAT.

8 IF THEY ARE GOING TO BE ALLOWED TO GET INTO THIS WE WOULD
9 SEE THAT AS OPENING THE DOOR AND FRANKLY YOUR HONOR WE WOULD
10 LIKE TO LIKE TO TRY TO GET INTO THEIR CONCEPTION STORY.

11 THE COURT: IF THEY KEEP THE DOOR CLOSED, THE DOOR IS
12 CLOSED ON YOU, BUT IF IT GETS OPENED YOU WILL HAVE AN
13 OPPORTUNITY.

14 LET'S TURN TO NUMBER TWO.

15 MR. UNDERHILL: YES.

16 THIS IS, AND AGAIN LAID OUT IN OUR PAPERS, AT VARIOUS TIMES
17 IN THIS LITIGATION THEY HAVE MADE NOISES ABOUT, YOU KNOW, BOY
18 SCHILLER BEING EVIL AND THERE'S SOME EMPLOYEE THEY SAY I DON'T
19 KNOW IF IT'S TRUE, I ASSUME IT IS, IN OUR NEW YORK OFFICE THAT
20 PREVIOUSLY DID SOMETHING WRONG AT A PRIOR LAW FIRM.

21 THERE WAS A STORY IN THERE ABOUT ME AT ONE POINT
22 INVOLVING A DISPUTE I HAD WITH MY SECRETARY AT ANOTHER LAW
23 FIRM. THIS KIND OF STUFF.

24 WE DON'T THINK IT'S REMOTELY RELEVANT TO THE LAWSUIT AND
25 WE DON'T THINK THAT THEY SHOULD BE ALLOWED TO GET INTO THEIR

1 PETTY ATTACKS ON OUR LAW FIRM OR INDIVIDUAL LAWYERS.

2 THE SECOND THING IS THEY HAVE AT VARIOUS TIMES MADE
3 ARGUMENTS ABOUT WHAT THIS LAWSUIT IS DOING TO THEM AND I DON'T
4 MEAN TO MINIMIZE THIS, I'M NOT AT ALL BEING FLIP ABOUT IT BUT
5 IT'S HEART BREAKING AND IT'S VARIOUS THINGS.

6 WE DO NOT BELIEVE THAT THAT'S APPROPRIATE TESTIMONY IN
7 FRONT OF THE JURY. AND ARE THEREFORE ASKING TO EXCLUDE THAT.

8 THE COURT: ALL RIGHT.

9 MR. FUISZ, GO AHEAD.

10 MR. JOE FUISZ: I JUST WANT TO CLARIFY BECAUSE I
11 FEEL -- I JUST WANT TO BE VERY CLEAR ABOUT SOMETHING. AND I
12 WILL SAY THIS, I HAVE HIGH PERSONAL REGARD AND APPROVAL AND
13 RESPECT FOR MR. UNDERHILL BASED ON MY EXPERIENCE WITH HIM. I
14 MEAN THAT IN ALL SINCERITY.

15 THE QUESTIONS THAT WERE ELICITED BY MR. MARSILLO FROM MY
16 BROTHER IN DEPOSITION ABOUT PARTNERS LEAVING, NO ONE EVER SAID
17 I HAVE TO SAY ANYTHING INJURIOUS ABOUT MR. UNDERHILL.

18 SO I RESENT A LITTLE BIT THE IMPLICATION THAT SOMEHOW WE
19 WENT AFTER MIKE NUMBER ONE.

20 NUMBER TWO, AND I DON'T WANT TO PUT HIS NAME ON THE
21 RECORD BUT HE OBVIOUSLY WORKS AT BOIES SCHILLER, AND I THINK
22 IT'S GREAT HE DOES, I WENT TO COLLEGE WITH HIM. HE'S A
23 GENTLEMAN I WENT TO COLLEGE WITH, HE'S A PARTNER, HE STOLE
24 \$700,00 IN CLIENT FUNDS. AND BOIES SCHILLER EMPLOYS HIM NOW.
25 AND I'M HAPPY FOR HIM IN A SINCERE WAY.

1 AND I ONLY RAISE THAT NOT TO GO AFTER THE GUY AT ALL. I
2 SIMPLY RAISE IT IN THE CONTEXT AND PERHAPS I MISUNDERSTOOD THE
3 LAW BEFORE YOUR HONOR. BUT WHEN THE QUESTION OF MR. KUNDU'S
4 REPRESENTATION WAS COMING UP AND OUR -- WELL ACTUALLY IT WASN'T
5 MR. KUNDU, AND WHETHER OR NOT AN UNPROVEN ALLEGATION AGAINST US
6 ESSENTIALLY AS BEING THIEVES WOULD DISQUALIFY US, I WAS MERELY
7 TRYING TO SAY, WELL, GUYS, IF THAT'S THE STANDARD, THAT CAN'T
8 BE THE STANDARD.

9 I CERTAINLY WAS NOT IN ANY CAMPAIGN TO DENIGRATE THE
10 BOIES SCHILLER FIRM OR THIS GENTLEMAN IN PARTICULAR, WHO LIKE I
11 SAY, I LIKE.

12 SO WHAT REALLY DROVE ME CRAZY ABOUT THIS MOTION IS, IT'S
13 LIKE I'M GOING TO ACCUSE YOU OF DOING SOMETHING BAD AND MUZZLE
14 YOU, BECAUSE TRUTHFULLY I REALLY DON'T THINK WE DID ANYTHING
15 IMPROPER.

16 AND AS FAR AS WHAT THIS CASE HAS MEANT TO US PERSONALLY,
17 I GUESS I'M CRAZY, I ASSERT THE FIRST AMENDMENT, I WANT TO TELL
18 MY STORY TO THE JURY YOUR HONOR. I REALLY DO.

19 THE COURT: ALL RIGHT. WELL, LET ME OFFER SOME
20 GUIDANCE.

21 AND I SHOULD SAY I'VE READ EVERY LINE IN THIS RECORD
22 INCLUDING THE EXCHANGE THAT YOU'RE REFERRING TO MR. FUISZ. SO
23 I HAVE A PRETTY CLEAR PICTURE OF WHAT'S BEEN COMMUNICATED HERE.

24 I'M GOING TO GRANT THE MOTION AS IT PERTAINS TO ANY
25 ATTACKS ON LITIGATION COUNSEL OR THE LAW FIRM OR ANY MOTIVES OF

1 EITHER THE LAW FIRM OR THE LAWYERS.

2 BUT AS TO WHETHER OR NOT THE FUISZ'S CAN TALK ABOUT WHAT
3 THIS CASE HAS MEANT TO THEM I'M GOING TO GIVE THEM THAT LEEWAY.
4 WE ARE NOT GOING TO HAVE A WHOLE SIDE SHOW ON THAT ISSUE
5 EITHER. BUT I THINK IT'S FAIR GAME FOR THEM TO MAKE THAT
6 REFERENCE.

7 AND OF COURSE, THERANOS WILL CERTAINLY HAVE THE
8 OPPORTUNITY TO TALK ABOUT THE EFFECT OF THE ALLEGATIONS IN THIS
9 CASE ON ITS BUSINESS. I THINK THAT'S FAIR TOO.

10 OKAY. LET'S TALK ABOUT, WE'VE ALREADY TOUCHED ON THIS
11 MR. UNDERHILL, NUMBER 3. BUT I THINK WE NEED TO CONFRONT IT
12 DIRECTLY.

13 I TAKE IT BY THIS MOTION YOU ARE SIMPLY LOOKING TO
14 EXCLUDE SOME OF THE ALLEGATIONS THAT WERE REFERRED TO EARLIER.

15 MR. UNDERHILL: ALL OF IT.

16 I MEAN, WHO ELIZABETH HOLMES HAS DATED IN HER LIFE IS
17 ABSOLUTELY RIDICULOUSLY IRRELEVANT TO THIS CASE. I DON'T HAVE
18 ANYTHING ELSE TO SAY.

19 THE COURT: MR. FUISZ?

20 MR. JOE FUISZ: I -- LISTEN, I HAVE NO INTEREST IN
21 ASKING ANY -- LOOK, IT'S ONLY BEEN RELEVANT TO TWO INSTANCES IN
22 THIS CASE. IT'S BEEN RELEVANT WHEN WE DEPOSED HER PARENTS IN
23 TERMS HOW THEY KNEW ABOUT THE COMPANY BECAUSE THE CONTACTS OF
24 THE MAKE SENSE IN WHAT THEY KNOW. THERE, IT WAS RELEVANT.

25 IF MR. BOMMANNAN IS GOING TO COME, HE'S IDENTIFIED ON THE

1 PRETRIAL WITNESS LIST, I THINK IT'S ABSOLUTELY FAIR GAME TO ASK
2 HIM -- HE DOES, I SHOULDN'T HAVE PUT HIS NAME ON THE RECORD,
3 I'M SORRY I DID -- IF IT CAN BE REDACTED --

4 THE COURT: WELL, HE'S ON THE WITNESS LIST, HE'S
5 ALREADY PART OF THE RECORD. SO GO AHEAD.

6 MR. JOE FUISZ: IT'S A MATTER OF PUBLIC RECORD HE
7 IDENTIFIES THE SAME RESIDENTIAL ADDRESS AS MS. HOLMES.

8 IF HE'S GOING TO TESTIFY IN THIS CASE I THINK IT'S A
9 REASONABLE QUESTION. I WOULD ASK HIM IN THE MOST TASTEFUL
10 RESPECTFUL WAY POSSIBLE.

11 IF A STIPULATION IS PREFERABLE TO PLAINTIFF OR WHATEVER,
12 THAT'S COOL. I DON'T WANT I REALLY DON'T WANT TO EMBARRASS
13 ANYBODY, I MEAN THAT. BUT I THINK IF HE DOES TESTIFY, IT'S
14 FAIR.

15 THE COURT: I JUST WANT TO FOCUS IN PARTICULAR ON
16 THIS INDIVIDUAL OR ANY OTHER WITNESS WHO MIGHT TESTIFY.

17 MR. UNDERHILL: YES. ON THIS FIRST, FIRST OF ALL HE
18 MAY OR MAY NOT TESTIFY.

19 SECONDLY, HE'S BEEN EMPLOYED AT THERANOS SINCE 2009.
20 DURING THE ENTIRE PERIOD OF HIS EMPLOYMENT WITH THE THERANOS
21 THERE HAS BEEN NO PERSONAL RELATIONSHIP WITH MS. HOLMES. WITH
22 RESPECT TO THIS IDEA ABOUT A COMMON RESIDENCE, I'LL REPRESENT
23 TO THE COURT BASED ON REPRESENTATIONS TO ME, THAT AT NO TIME
24 WHILE MR. BOMMANNAN HAS BEEN EMPLOYED AT THERANOS WHICH IS 2009
25 TO DATE, HAVE HE AND MS. HOLMES EVER SHARED A RESIDENCE.

1 SO THAT'S ALL I HAVE TO SAY. I THINK IT'S ABSOLUTELY
2 IRRELEVANT.

3 THE COURT: GO. IF YOU WANT TO SAY SOMETHING
4 DR. FUISZ, GO AHEAD.

5 MR. RICHARD FUISZ: JUST SO IT'S NOT MISUNDERSTOOD,
6 IT'S NOT COMING OUT OF THIN AIR.

7 MY WIFE WAS PRESENT MANY TIMES WHEN ELIZABETH HOME'S
8 MOTHER ELIZABETH HOLMES WAS ON THE PHONE AND THE COMPLAINT WAS
9 MADE THAT THIS MAN --

10 MR. UNDERHILL: YOUR HONOR, I OBJECT THAT THIS GO ON
11 IN OPEN COURT. WE DON'T NEED A TRANSCRIPT ON THIS AND IT IS
12 IRRELEVANT.

13 MR. RICHARD FUISZ: WHY IS IT IRRELEVANT?

14 MR. UNDERHILL: ANYTHING THE GENTLEMAN IS GOING TO
15 SAY, I BELIEVE RELATES TO --

16 MR. RICHARD FUISZ: WELL, THEY WENT TO PARIS
17 TOGETHER, THEY WENT TO ASPEN TOGETHER.

18 THE COURT: ALL RIGHT.

19 MR. RICHARD FUISZ: WHY IS THAT NOT RELEVANT?

20 THE COURT: IF I CAN INTERRUPT HERE.

21 I THINK I UNDERSTAND THE GIST OF WHAT IS AT ISSUE, AND LET
22 ME SAY THIS.

23 I'M GOING TO GRANT THE MOTION IN LIMINE. HOWEVER, IF ANY
24 WITNESS TESTIFIES AND THAT WITNESS HAS HAD A RELATIONSHIP WITH
25 ANY PRINCIPAL IN THIS CASE THAT GOES TO BIAS MOTIVE AND SO

1 FORTH, I WILL ALLOW THAT QUESTIONING TO TAKE PLACE. BUT IF
2 THEY DON'T TESTIFY, NONE OF THIS IS COMING IN. SO LET'S JUST
3 BE CLEAR ABOUT THAT.

4 ALL RIGHT. MOTION IN LIMINE NUMBER 5. THIS HAS TO DO
5 WITH THE MCDERMOTT CLAIMS.

6 THE COURT: MR. MARSILLO.

7 MR. MARSILLO: GOOD AFTERNOON, YOUR HONOR. I WILL BE
8 BRIEF.

9 SO WHEN WE FILED THIS ACTION WE BROUGHT CLAIMS AGAINST
10 JOHN FUISZ AS WELL. THERE WAS A SEPARATE ACTION EVENTUALLY
11 BROUGHT AGAINST THE MCDERMOTT LAW FIRM. JUDGE ROGERS DISMISSED
12 CLAIMS AGAINST MR. FUISZ BASED ON THE STATUTE OF LIMITATIONS.
13 AND THEN JUDGE ISCOE IN D.C. SUPERIOR COURT DISMISSED CLAIMS
14 AGAINST MCDERMOTT BASED ON RES JUDICATA.

15 NEITHER COURT FOUND THAT ALLEGATIONS --

16 THE COURT: CAN I STOP YOU THERE. I APPRECIATE THIS
17 ELEMENT OF HIS RULING IN WASHINGTON.

18 IT WAS A RES JUDICATA RULING?

19 MR. MARSILLO: THERE WERE SEPARATE GROUNDS. THE
20 PRIMARY ONE BEING RES JUDICATA BECAUSE CLAIMS COULD NOT BE
21 CONTINUED AGAINST JOHN FUISZ BECAUSE THEY WERE UNTIMELY. THEY
22 COULD NOT BE BROUGHT AGAINST MCDERMOTT. SO NEITHER COURT FOUND
23 THAT ANY OF THE ALLEGATIONS IN THIS CASE WERE UNTRUE OR FALSE.

24 THOSE RULINGS ARE IRRELEVANT FOR THESE PROCEEDINGS.

25 NOW THE FUISZ'S IN VARIOUS CONTEXT HAVE ALLUDED TO THOSE

1 RULINGS IN AN EFFORT TO SAY THAT SOMEHOW THE CLAIMS AGAINST
2 THEM ARE UNFOUNDED.

3 WE BELIEVE THAT ANY TESTIMONY ALONG THESE LINES TO THE
4 JURY, FIRST OF ALL, IT ISN'T RELEVANT.

5 SECOND OF ALL, IT WOULD BE PREJUDICIAL. AND THIRD OF ALL
6 AS YOUR HONOR KNOWS, THE CLAIMS HERE HAVE SURVIVED BOTH A
7 MOTION TO DISMISS AS WELL AS SUMMARY JUDGEMENT.

8 AND SO IF WE ARE GOING TO GET INTO DISMISSAL OF UNRELATED
9 PROCEEDINGS OR BASED ON THE STATUTE OF LIMITATIONS GROUNDS, WE
10 WOULD HAVE A BASIS TO RESPOND IN KIND. AND IT JUST SEEMS TO
11 LEAD TO AN ENTIRE SIDE SHOW.

12 THE COURT: ALL RIGHT. THANK YOU.

13 MR. FUISZ, GO AHEAD.

14 MR. JOE FUISZ: MY UNDERSTANDING, AND I'M SORRY, I
15 THINK BILL DID THE ORAL ARGUMENT THERE SO HE SHOULD REMEMBER IT
16 BETTER THAN I DID. I ACTUALLY THINK IT WAS DISMISSED IN D.C.
17 ON 4 OR 5 INDEPENDENT GROUNDS, NOT JUST RES JUDICATA, FAILURE
18 TO STATE, IQBAL, TWOMBLY, MY MEMORY IS ESCAPING ME.

19 LISTEN, I AGREE WITH MR. MARSILLO, IT IS NOT A
20 SUBSTANTIVE RULING IN THIS CASE OF OUR INNOCENCE AND COULD NOT
21 BE PRESENTED TO THE JUDGE AS SUCH. THAT BEING SAID, I DO FEEL
22 I BELIEVE THAT PART OF THE NARRATIVE OF THIS CASE AND WHAT HAS
23 HAPPENED, AND FRANKLY WHAT MAY ACTUALLY HELP THEM IN SOME
24 RESPECTS BECAUSE THEY MAY WANT TO ARGUE MCDERMOTT WAS BIASED IN
25 TERMS OF MR. RECKTOFF, GIVES US GREAT TESTIMONY, THEY MIGHT

1 WANT TO SAY IT'S BECAUSE THEY SUED HIM.

2 BUT I DO THINK THE NARRATIVE OF WHAT WAS DONE IN TERMS OF
3 ENTERING INTO A SECRET TOLLING AGREEMENT WITH MCDERMOTT, FILING
4 A -- WRITING A COMPLAINT WITH A THOUSAND-LAWYER LAW FIRM,
5 REFERRING TO IT AS JOHN FUISZ'S LAW FIRM.

6 THERE'S NO DOUBT IN MY MIND WHAT I BELIEVE WHAT WAS HOPED
7 TO ACCOMPLISH WAS TO PROTECT MCDERMOTT'S NAME AND GET THEM TO
8 TURN ON MY BROTHER.

9 I THINK THE NARRATIVE OF HOW THIS CASE HAS UN FOLDED I
10 THINK IS VERY IMPORTANT TO OUR DEFENSE. BUT I DO, SHOCKINGLY
11 ENOUGH, I MEAN I AGREE WITH MR. MARSILLO, I CAN'T USE THE
12 DECISION IN THAT CASE AS EVIDENCE OF OUR INNOCENCE. I THINK
13 HE'S RIGHT ABOUT THAT.

14 THE COURT: OKAY. WELL, BECAUSE I DON'T THINK THE
15 DECISION IN THAT CASE OR THE SUBSTANCE OF JUDGE GONZALEZ
16 ROGER'S RULING WOULD BE PROPERLY ADMITTED, I'M FRANKLY NOT
17 PERSUADED THAT LETTING THE JURY GET INTO THE WHOLE PROCEDURAL
18 HISTORY OF HOW MCDERMOTT CAME TO BE IN THIS CASE AND THEN GOT
19 OUT IS REALLY GOING TO BE APPROPRIATE.

20 I THINK ON A 403 BASES ALONE I THINK IT WOULD BE VERY
21 CONFUSING TO THEM. IF YOU HAVEN'T PICKED UP ON ONE THING, I
22 HOPE YOU PICK UP ON THIS I'M TRYING TO HAVE A RATHER MUNDANE
23 PEDESTRIAN NOTHING TO SEE HERE KIND OF TRIAL WITH ALL OF THESE
24 ALLEGATIONS FLYING AROUND.

25 SO I DO NOT WANT TO HAVE A LOT OF ANCILLARY OR

1 UNNECESSARY CONFUSION ON THE PART OF THE JURY. SO ON THAT
2 BASIS I'M GOING TO GRANT THIS MOTION.

3 MOTION IN LIMINE NUMBER 6 HAS TO DO WITH MRS. GIBBONS, I
4 BELIEVE. WE'VE TALKED ABOUT THAT ALREADY.

5 MR. UNDERHILL: YES, YOUR HONOR. I DON'T THINK
6 THERE'S ANYTHING ELSE FOR US TO SAY.

7 I WOULD ASSUME IN LIGHT OF YOUR EARLIER RULING THAT THIS
8 WOULD GO SIMILARLY.

9 THE COURT: THAT ASSUMPTION IS CORRECT. THIS MOTION
10 IS GRANTED. I WILL JUST CUT TO THE CHASE.

11 BY MY ACCOUNT WE HAVE COVERED ALL THE MOTIONS, WHICH I'M
12 QUITE PLEASED WITH.

13 MR. UNDERHILL: I THINK WE MISSED ONE, YOUR HONOR.
14 MOTION IN LIMINE NUMBER 4. THIS IS ALLEGATIONS OF
15 MISTREATMENT OF ELIZABETH HOLMES.

16 THE COURT: AH YES. OKAY. GO AHEAD.

17 MR. UNDERHILL: AND AGAIN, I THINK WE FULLY BRIEFED
18 IT. THEY HAVE LIKE TWO SENTENCES IN RESPONSE SO I THINK IT'S
19 FAIRLY IN FRONT OF YOUR COURT.

20 I THINK IT'S AN EMOTIONAL APPEAL THAT'S IMPROPER. IT'S
21 THE -- SHE WAS ABUSED BY HER PARENTS WHO AS I UNDERSTAND THE
22 ARGUMENT PLACED UNREASONABLE DEMANDS ON HER. WE SEE IN THE
23 E-MAILS WITH RACHELLE GIBBONS AND ALSO PHYLLIS GARDENER, IS
24 THAT HER NAME, SPECULATION ABOUT OUR CEO SANITY AND, YOU KNOW,
25 PSYCHOANALYSIS OF WHAT MADE HER THE WAY SHE IS.

1 AND YOU KNOW, I JUST AGAIN, I THINK IT'S RIDICULOUS. AND
2 WE SHOULD NOT PERMIT ANY SORT OF SUGGESTIONS THAT SHE WAS
3 MISTREATED OR ABUSED BY VENTURE CAPITALISTS OR OTHERS,
4 INCLUDING HER PARENTS.

5 THE COURT: GO AHEAD, MR. FUISZ.

6 MR. JOE FUISZ: YOUR HONOR, THIS IS ANOTHER ONE OF
7 THESE STOP BEATING YOUR WIFE KIND OF MOTIONS.

8 IF SOMETHING IMPROPER HAPPENS AT TRIAL, YOU KNOW, I
9 HONESTLY WAS SHOCKED I GOT THE PAPERS OH, MY GOD WHAT ARE THEY
10 TALKING ABOUT, THIS IS SOUNDS SO TERRIBLE. THEN WHAT I SAID
11 THEY WERE SAYING OPINIONS ELICITED FROM MY DAD IN HIS
12 DEPOSITION.

13 BY ALL MEANS IF WE DO ANYTHING IMPROPER IN TERMS OF THE
14 WAY WE CHARACTERIZE PLAINTIFF IN THE TRIAL, I WOULD INVITE
15 FIRST OF ALL I HOPE WE DON'T DO IT BUT I WOULD INVITE THEM TO
16 OBJECT. BUT I WOULD RESPECTFULLY ASK THIS MOTION BE DENIED.

17 THE COURT: OKAY.

18 WELL, I WILL GRANT THE MOTION. BUT AGAIN, I WANT TO BE
19 CLEAR. MR. FUISZ HAS TOUCHED UPON THIS, IF THERE ARE ANY
20 CIRCUMSTANCES ARISING DURING THE TRIAL WHERE THESE ISSUES MIGHT
21 CONCEIVABLY BECOME RELEVANT, I'M OPEN TO REVISITING THESE
22 ISSUES.

23 BUT I BELIEVE IN GIVING AS MUCH GUIDANCE IN ADVANCE OF
24 THE TRIAL SO EVERYBODY UNDERSTANDS WHAT THE GENERAL GROUND
25 RULES WILL BE.

1 BUT AGAIN ON THIS ISSUE, AND FRANKLY ANY OF THE ISSUE
2 OTHERS WE TALKED ABOUT TODAY, IF SOMETHING SHOULD COME UP AND
3 CIRCUMSTANCES CHANGE I WILL ENTERTAIN A REQUEST, I WON'T
4 HESITATE TO CHANGE MY MIND IF I HAVE TO.

5 ALL RIGHT. WITH THAT I THINK WE COVERED ALL THE PENDING
6 MOTIONS THAT ARE BEFORE THE COURT THIS AFTERNOON.

7 MR. FUISZ --

8 MR. JOE FUISZ: IN OUR DAUBERT ONE THING YOU DIDN'T
9 COVER WAS WE HAD ASKED YOU TO PRECLUDE CLARKE AND ROBERTSON
10 FROM OPINING ON OUR INVESTORSHIP CAPABILITIES. I ARGUED THEY
11 WEREN'T QUALIFIED, HAD NO BASIS TO DO SO, NOTHING IN THEIR
12 CURRICULUM VITAE, THERE'S NO SCIENTIFIC METHOD, THERE'S NO
13 DAUBERT CRITERIA THAT I THINK CAN POSSIBLY BE SATISFIED.

14 SO I JUST WANTED TO MENTION THAT.

15 THE COURT: I THINK YOU'VE MADE YOUR RECORD AND I'M
16 GLAD YOU DID. I DID DENY THAT MOTION.

17 MR. JOE FUISZ: I'M SORRY. I MISUNDERSTOOD.

18 THE COURT: NO, NO, YOU DON'T NEED TO APOLOGIZE. YOU
19 SHOULD ALWAYS PRESERVE THE RECORD. THAT'S ALWAYS A GOOD TRIAL
20 PRACTICE.

21 ALL RIGHT. WITH THAT, AS I MENTION, I WILL DEAL WITH THE
22 CONCLUSION OF FINDINGS AND JURY INSTRUCTIONS AT TRIAL.

23 MY UNDERSTANDING IS WE ARE SCHEDULED TO BEGIN TRIAL
24 INJURY SELECTION ON WEDNESDAY AFTERNOON AT 1:30; MR. RIVERA, IS
25 THAT RIGHT?

1 THE CLERK: YES, YOUR HONOR.

2 THE COURT: OKAY. ALL RIGHT.

3 BETWEEN NOW AND THEN I WILL ISSUE A SHORT ORDER
4 MEMORIALIZING THESE RULINGS SO YOU WILL HAVE SOMETHING TO READ
5 AND REFER TO OTHER THAN THE TRANSCRIPT.

6 ARE THERE ANY OTHER ITEMS WE CAN PRODUCTIVELY ADDRESS
7 WHILE WE ARE ALL TOGETHER?

8 MR. UNDERHILL: IF YOU WOULDN'T MIND BRIEFLY TELLING
9 US HOW YOU WOULD LIKE TO DO VOIR DIRE, THAT WOULD BE HELPFUL.

10 THE COURT: I THINK THAT WILL BE HELPFUL FOR
11 EVERYONE'S BENEFIT.

12 WHAT I WILL DO IN THIS TRIAL IS WHAT I HAVE DONE IN EVERY
13 JURY TRIAL I HAVE PROCEEDED OVER.

14 MY EXPECTATION IS WE WILL BRING IN SOMEWHERE BETWEEN 30
15 TO 40 PERSPECTIVE JURORS ON WEDNESDAY AFTERNOON. THAT FINAL
16 NUMBER WILL BE DETERMINED BY THE CLERK'S OFFICE BUT IT WILL BE
17 ROUGHLY IN THAT RANGE.

18 AFTER THE JURY IS SEATED IN HERE I WILL BEGIN THE VOIR
19 DIRE AND I WILL CONDUCT THE MAJORITY OF THE JURY SELECTION OF
20 VOIR DIRE MYSELF.

21 THE JURORS WILL BE SEATED IN NUMERICAL ORDER STARTING
22 WITH SEAT NUMBER 1, THAT'S WHERE MY LAW CLERK IS CURRENTLY
23 SITTING, AND THEY'LL CONTINUE ON TO SEAT NUMBER 14. 15 THROUGH
24 40 WILL THEN BE SEATED IN THE FRONT TWO ROWS BACK THERE.

25 THE BASIC PREMISE OF MY JURY SELECTION IS THAT THE FIRST

1 NINE JURORS WILL SERVE AS THE JURY UNLESS WE MIND A REASON TO
2 EXCLUDE THEM. AND THERE MAY BE ALL SORTS OF REASONS TO EXCLUDE
3 THEM. BUT LET ME FOCUS ON THE EXAMINATION FIRST BEFORE WE TALK
4 ABOUT THE EXPLANATION EXERCISE.

5 I HAVE A STOCK SET OF BIOGRAPHICAL QUESTIONS I WILL ASK
6 OF EACH OF THE MEMBERS OF THE POOL. MR. RIVERA CAN PROVIDE YOU
7 WITH MY OUTLINE. IT'S PRETTY SIMPLE AND NOT TERRIBLY ORIGINAL.

8 ONCE I HAVE COMPLETED THAT EXERCISE OF ASKING EACH JUROR
9 TO STAND AND PROVIDE THEIR NAME, WHERE THEY LIVE, WHO LIVES
10 WITH THEM, WHAT KIND OF WORK THEY DO, THAT SORT OF THING, I
11 WILL THEN AND I WILL HAVE SOME FOLLOW UP QUESTIONS BASED ON THE
12 RESPONSES.

13 I WILL INVITE EACH SIDE TO ASK THEIR OWN QUESTIONS OF THE
14 JURY AND I WILL GIVE YOU EACH ABOUT A HALF AN HOUR TO ASK
15 WHATEVER QUESTIONS YOU LIKE.

16 MY EXPERIENCE IS AFTER ABOUT 30 MINUTES THEY ARE PRETTY
17 SICK OF YOU, SO I DO PUT THAT HARD CAP. BUT IF THERE ARE SOME
18 REASONS YOU NEED MORE TIME IN LIGHT OF A SPECTACULAR
19 REVELATION, I WOULD BE OPEN TO IT.

20 I RECOGNIZE IN TRIAL, LAWYERS AND GOOD PRO SE PARTIES
21 WANT TO DO IN VOIR DIRE AND IT'S NOT ALWAYS FOCUSED ON PICKING
22 A FAIR AND UNBIASSED JURY, SO I WILL POLICE VERY CAREFULLY ANY
23 EFFORTS TO INFLUENCE THE JURY RATHER THAN TO ELICIT APPROPRIATE
24 INFORMATION.

25 BUT I WANT TO GIVE YOU ALL THE CHANCE TO ENGAGE WITH THEM

1 I THINK IT'S IMPORTANT I THINK IT'S AN IMPORTANT PART OF DUE
2 PROCESS.

3 ONCE WE HAVE COMPLETED THAT EXERCISE I WILL THEN EITHER
4 DISMISS THE POOL OR KEEP THEM PRESENT BUT INVITE COUNSEL AND
5 THE FUISZ'S, ALONG WITH MY COURT REPORTER, TO RETIRE TO MY
6 CONFERENCE ROOM. I BELIEVE SOME OF YOU KNOW IT WELL FROM SOME
7 EARLIER EXERCISES IN THIS CASE.

8 IN THERE OR OUT HERE, DEPENDING ON HOW THE LOGISTICS
9 WORK, WE WILL THEN GO THROUGH THE PROCESS OF HARDSHIP AND CAUSE
10 CHALLENGES OR DISMISSALS.

11 TYPICALLY, I FLAG FOR BOTH SIDES THE JURORS WHOM I
12 BELIEVE ARE APPROPRIATELY DISMISSED FOR HARDSHIP OR CAUSE
13 REASONS, BUT I WILL INVITE EACH OF YOU TO MAKE FURTHER
14 ARGUMENTS OR ADDITIONAL SUGGESTIONS. I WILL RULE ON WHO OUGHT
15 TO BE DISMISSED ON THAT BASIS, THEN WE WILL TURN TO THE
16 BUSINESS OF PEREMPTORY CHALLENGES.

17 I WILL GIVE EACH OF YOU THREE PEREMPTORIES. SO BEGINNING
18 WITH THE PLAINTIFFS, AS IS MY CUSTOM, WE WILL PASS A SHEET BACK
19 AND FORTH AND YOU WILL BE ALLOWED TO STRIKE UP TO THREE ON EACH
20 SIDE.

21 IF YOU PASS, THAT IS IF YOU ELECT NOT TO STRIKE SOMEONE,
22 THAT PASS COUNTS AS ONE OF YOUR STRIKES.

23 SO ONCE WE ARE DONE WITH THAT, THE LIST OF 39 OR 40
24 JURORS WILL HAVE INDIVIDUALS STRUCK FOR HARDSHIP, INDIVIDUALS
25 STUCK FOR CAUSE AND THEN UP TO SIX MORE INDIVIDUALS WHO ARE

1 STRUCK ON A PEREMPTORY BASIS. WE THEN TAKE THE FIRST NINE
2 PEOPLE WHO ARE LEFT AND THAT'S YOUR JURY.

3 I WON'T TELL YOU HOW TO USE YOUR STRIKES OR SPEND YOUR
4 TIME, BUT I WOULD JUST OFFER THE SUGGESTION THAT BECAUSE OF MY
5 PARTICULAR METHOD, SPENDING A HECK OF A LOT OF TIME ON JURORS
6 NUMBERS 36, 37, 38, 39, NOT TERRIBLY PRODUCTIVE. ODDS ARE
7 PRETTY SLIM IN A CASE LIKE THIS THAT WE ARE GOING TO GET PRETTY
8 FAR FOOT POOL. BUT YOU CAN DO WHAT YOU LIKE.

9 DOES THAT MAKE SENSE TO EVERYBODY? DO YOU UNDERSTAND HOW
10 WE'RE GOING TO DO THIS?

11 MR. UNDERHILL: YES, YOUR HONOR.

12 THE COURT: ANY OTHER LOGISTICS QUESTIONS AND ANY
13 OTHER ISSUES?

14 MR. UNDERHILL: YES, AND I DON'T THINK THIS IS GOING
15 TO BE TIME CONSUMING, BUT YOU MAY RECALL BACK IN DECEMBER WE
16 TALKED ABOUT A PROCEDURAL ISSUE WE DO HAVE TO ADDRESS IN THE
17 CASE. WHICH IS FUISZ PHARMA IS A CORPORATION, IT'S IN THE
18 LAWSUIT, IT'S NOT REPRESENTED BY COUNSEL.

19 THE COURT: WHERE DID WE LEAVE THAT?

20 MR. UNDERHILL: WELL, WHAT HAPPENED WAS ON
21 DECEMBER 31ST, LESS ANYONE SAY I WAS OUT CELEBRATING NEW YEARS
22 EVE, I WAS ACTUALLY WRITING AN E-MAIL TO THE FUISZES IN WHICH I
23 KIND OF LAID OUT WHAT WE WOULD FIND ACCEPTABLE.

24 I DON'T BELIEVE WE EVER REACHED AGREEMENT ON THAT THERE
25 WAS LATER REPRESENTATION FROM OPPOSING COUNSEL TO THE COURT

1 THAT WE HAD BEEN MEETING AND CONFERRING. I HAD AN IMPRESSION
2 THAT WE HAD AN AGREEMENT OR WERE VERY CLOSE TO AN AGREEMENT.

3 WHAT I HAVE DONE TODAY IS WE DRAFTED A STIPULATION. IT
4 ACTUALLY SAYS JOINT, BUT THE FUISZ'S HAVE ONLY GOTTEN IT TODAY
5 BUT HAVE NOT SIGNED OFF ON IT, ALTHOUGH I HOPE THAT THEY WILL.

6 I WOULD LIKE TO PASS UP A COPY OF IT JUST SO THE COURT
7 CAN SEE IT, THEN I WOULD PROPOSE I WORK WITH MR. FUISZ OVER THE
8 NEXT DAY TO TRY TO GET THIS THING FINALIZED.

9 AND YOU WILL SEE THAT WE ARE SEEKING REPRESENTATIONS FOR
10 EXAMPLE THAT FUISZ PHARMA IS OWNED BY THESE TWO INDIVIDUALS,
11 HAS NEVER BEEN OWNED BY ANYBODY ELSE, DOES IN FACT OWN THE
12 PATENT, WILL IN FACT BE BOUND BY THE RESULT OF THE TRIAL.

13 SO I THINK, IN MY HUMBLE OPINION, THIS IS A PRETTY
14 VANILLA THING, WE ARE NOT ASKING THEM TO SIGN AWAY THEIR LIVES
15 OR ANYTHING, SO HOPEFULLY WE WILL GET THIS RESOLVED. BUT I
16 WOULD SUGGEST YOUR HONOR THAT THIS IS SOMETHING WE NEED TO
17 BUTTON DOWN BEFORE THE TRIAL STARTS.

18 THE COURT: OKAY.

19 WELL, OBVIOUSLY, THE FUISZ'S HAVEN'T HAD AN OPPORTUNITY TO
20 EVEN READ THIS YET. MR. FUISZ DO YOU WANT TO OFFER ANY INITIAL
21 REACTION?

22 MR. JOE FUISZ: LISTEN, I MEAN, LOOK, IN PRINCIPLE WE
23 HAVE AN AGREEMENT. I WILL GO THROUGH THIS.

24 THE ONLY THING THIS DOESN'T CONTEMPLATE IS MS. ANDERSON'S
25 PARTICIPATION WHICH WE MAY ABSOLUTELY REQUIRE WITH RESPECT TO

1 AEO MATERIALS.

2 AND IF SHE HAS TIME, I MAY ACTUALLY ASK HER TO HELP US
3 OUT A LITTLE BIT SINCE WE ARE GOING TO BE SO OVER MANNED.

4 MR. UNDERHILL: FINE WITH US, YOUR HONOR.

5 AND IN FACT, IF MS. ANDERSON ENTERS AN APPEARANCE FOR FUISZ
6 PHARMA, WE ARE DONE, WE DON'T NEED TO DO THIS.

7 (OFF-THE-RECORD DISCUSSION.)

8 THE COURT: GO AHEAD, DR. FUISZ.

9 MR. RICHARD FUISZ: YOUR HONOR, MAY I ASK YOU, IF YOU
10 CAN EXPLAIN TO ME WHAT IS AN ADVISORY JURY?

11 THE COURT: THAT'S A FAIR QUESTION. WE DON'T HAVE A
12 LOT OF THEM HERE IN OUR COURT, DR. FUISZ.

13 THE ADVISORY JURY WILL RENDER A VERDICT LIKE ANY JURY IN
14 ANY CASE. I WILL PUT TO THEM A SERIES OF QUESTIONS IN THE FORM
15 OF A JURY VERDICT FORM AND THEY WILL THEN COMPLETE THAT
16 INDICATING THEIR FINDINGS ON THE KEY ISSUES IN THE CASE.

17 BECAUSE IT'S AN ADVISORY JURY HOWEVER, THAT WILL NOT BIND
18 THIS COURT IN WHAT JUDGMENT WILL BE ENTERED. I STILL HAVE THE
19 RESPONSIBILITY OF DRAFTING FINDINGS OF FACT AND CONCLUSIONS OF
20 LAW THAT GIVE THE COURT'S JUDGMENT. THAT'S THE JUDGMENT THAT
21 WILL ENTER AND ON THAT BASIS WILL PROCEED.

22 THE WHOLE PURPOSE OF THE ADVISORY JURY IS TWO FOLD. ONE
23 IS TO GIVE ME ADVICE ON WHAT NINE MEMBERS OF THE COMMUNITY
24 THINK ABOUT THESE ISSUES.

25 THE SECOND AND I THINK I WAS RATHER TRANSPARENT ABOUT

1 THIS IN MY ORDER, IT'S TO COVER MY BACKSIDE IN CASE THE CIRCUIT
2 COURT SAYS YOU SHOULD HAVE PUT THE WHOLE CASE TO THE JURY AND
3 NOT DECIDE ANYTHING AS A MATTER OF LAW. DOES THAT MAKE SENSE?

4 ALL RIGHT. SINCE WE ARE TALKING ABOUT LOGISTICS AND IF
5 I'VE ALREADY COVERED THIS WITH YOU I WILL APOLOGIZE, I WOULD
6 TAKE OUR LAFT FEW MINUTES TO COVER SOME ADDITIONAL ISSUES.

7 OUR SCHEDULE, AS I SAID WE WILL BEGIN WEDNESDAY AT 1:30.
8 I HAVE EVERY EXPECTATION WE WILL HAVE THE JURY SEATED BY THE
9 END OF THE DAY AND THEN WE WILL BEGIN WITH OPENING STATEMENTS
10 ON THURSDAY MORNING.

11 ONCE WE BEGIN ON THURSDAY, OUR TRIAL DAYS WILL ALWAYS
12 BEGIN WITH COUNSEL AND THE FUISZ DEFENDANTS APPEARING HERE IN
13 COURT AT 8:30 READY TO GO, READY TO RESOLVE ANY DISPUTES
14 REGARDING DOCUMENTS OR DEPOSITION TRANSCRIPTS, OR ANY KINDS OF
15 THINGS THAT WE REALLY SHOULDN'T WASTE THE JURY'S TIME WITH.

16 I WILL ASK THE JURY TO APPEAR HERE READY TO GO AT
17 9:00 A.M. THEY WILL CONVENE IN MY JURY ROOM. ASSUMING WE CAN
18 RESOLVE ALL OF OUR ISSUES PROMPTLY BY 9, WE WILL BEGIN AT THAT
19 TIME WITH TESTIMONY.

20 ON DAY ONE OF COURSE, HOWEVER, WE WILL BEGIN WITH
21 SOMETHING SLIGHTLY DIFFERENT. I WILL HAVE A SET OF PRELIMINARY
22 INSTRUCTIONS THAT JUST BASICALLY EXPLAIN TO THE JURY HOW THE
23 TRIAL WILL PROCEED, WHAT EVIDENCE IS, THAT SORT OF THING. I
24 USE THE STOCK SET PROVIDED TO THE NINTH CIRCUIT MODEL
25 INSTRUCTIONS SO THERE'S NOTHING TERRIBLY ORIGINAL THERE.

1 ONCE I GIVE THOSE PRELIMINARY INSTRUCTIONS WE WILL TURN
2 TO OPENING STATEMENTS. WE WILL HEAR FROM EACH SIDE, THEN ONCE
3 OPENING STATEMENTS ARE COMPLETED WE WILL TURN TO THE
4 PLAINTIFF'S CASE IN CHIEF.

5 EACH DAY I TEND TO TAKE A RECESS IN THE MORNING AND A
6 RECESS IN THE AFTERNOON. TEN MINUTES TO LET PEOPLE STRETCH
7 THEIR LEGS AND GIVE THE COURT REPORTER A BREAK.

8 WE WILL TAKE AN HOUR FOR LUNCH. I EXPECT THAT WE WILL
9 COMPLETE EACH TRIAL DAY PROMPTLY AT 4:30. I FIND THAT THE 9:00
10 TO 4:30 SCHEDULE GIVES FOLKS WITH ELDERLY AND CHILD CARE
11 RESPONSIBILITIES A FAIR CHANCE AT PARTICIPATING. I THINK
12 THAT'S VERY IMPORTANT.

13 THERE IS ONE TWEAK I SHOULD FLAG FOR YOU ALL. ON THE
14 FIRST TUESDAY AFTER WE BEGIN, WHICH IF I'M RIGHT ABOUT THAT, IS
15 TUESDAY MARCH 11TH, MR. RIVERA IS THAT RIGHT?

16 THE CLERK: YES, YOUR HONOR. THE 18TH, YOUR HONOR.

17 THE COURT: AND WE HAVE A SIMILAR ISSUE ON THE 18TH.

18 I DO HAVE MY LAW AND MOTION CALENDAR AND I HAVE NOT YET
19 CLEARED THAT. WHAT THAT MEANS IS THOSE TWO TUESDAYS I'M HOPING
20 WE DON'T HAVE TO GO TO THE SECOND TUESDAY, BUT IF WE DO IT, IT
21 WILL APPLY THERE AS WELL.

22 I WILL GIVE THE JURY THE MORNING OFF. I WILL GIVE YOU THE
23 MORNING OFF AS WELL AND I WILL DO MY LAW AND MOTION CALENDAR AT
24 THAT TIME, THEN WE WILL BEGIN IN THE AFTERNOON AT 1:30.

25 SO WE WILL DO A HALF DAY THAT DAY IS WHAT I'M TRYING TO

1 SAY.

2 MR. BOIES: EXCUSE ME, YOUR HONOR.

3 THE COURT: YES, GO AHEAD.

4 MR. BOIES: ARE YOU PLANNING HAVE TRIAL MARCH 11TH?
5 I THOUGHT WE STARTED MARCH 12TH.

6 THE COURT: I'M SORRY.

7 THANK YOU FOR CORRECTING MY ERROR. I WAS LOOKING AT THE
8 WRONG WEEK OF THE MONTHLY CALENDAR, MR. BOIES. CORRECT.

9 MR. BOIES: OH, I'M GLAD.

10 THE COURT: CORRECT. I WAS MISTAKEN.

11 I MEANT TO REFER TO THE 18TH AND THE 25TH AS THE TWO
12 TUESDAYS WHERE I MAY HAVE A PROBLEM WITH MY LAW AND MOTION
13 CALENDAR. DOES THAT CLEAR THINGS UP?

14 MR. BOIES: YES, THANK YOU.

15 THE COURT: OKAY. THANK YOU FOR THAT.

16 SO THOSE ARE THE HOURS AND THE BASIC SCHEDULE I WANT TO
17 KEEP.

18 ONE OTHER CURVE BALL I WILL THROW AT YOU. I AM ON
19 CRIMINAL DUTY THIS MONTH. SO IN ADDITION TO RESOLVING ANY
20 DISPUTES YOU MAY HAVE REGARDING TRIAL DAY MATTERS, AT 8:30 I
21 WILL ALSO CONDUCT MY CRIMINAL CALENDAR. THAT MAY TAKE TEN
22 MINUTES, IT MAY TAKE THREE HOURS, I JUST DON'T HAVE ANY CONTROL
23 OVER THE ACTIVITIES OF OUR FRIENDS IN THE BUREAU AND DEA AND SO
24 FORTH.

25 SO BE PREPARED FOR SOME DELAYS IN THAT REGARD.

1 ANYTHING ELSE I CAN TELL YOU ABOUT HOW YOU RUN THINGS OR
2 THAT YOU WANT TO FIGURE OUT?

3 ANY MORE DOWN IN THE WEEDS OR SORTS OF QUESTIONS,
4 STICKERS ON DOCUMENTS, OR BINDERS, YOU CAN ALWAYS SEND OUT AN
5 E-MAIL TO MR. RIVERA

6 MR. UNDERHILL: THANK YOU, YOUR HONOR.

7 MR. BOIES: YOUR HONOR, I APOLOGIZE IF YOU HAVE
8 ALREADY COVERED THIS.

9 HAVE YOU COVERED THE LENGTH OF THE OPENING STATEMENTS?

10 THE COURT: I HAD NOT SPOKEN SPECIFICALLY TO THAT. I
11 DON'T BELIEVE IN A CASE LIKE THIS IT'S NECESSARY OR APPROPRIATE
12 FOR ME TO PUT A HARD CAP OR A CLOCK ON THE OPENING STATEMENTS
13 THEMSELVES.

14 FORGIVE ME IF I HAVE ALREADY ISSUED AN ORDER SETTING OUT
15 HOURS LIKE THAT, I DON'T THINK I HAVE IN THIS CASE. I'M NOT
16 INCLINED TO DO IT.

17 I DON'T HAVE TO TELL THE FOLKS IN THIS CASE THAT, YOU KNOW,
18 YOU PROCEED PAST AN HOUR AT YOUR PERIL. THAT'S JUST MY LIMITED
19 EXPERIENCE. BUT I DON'T HAVE A HARD CAP YOU HAVE TO WORRY
20 ABOUT, AND THE SAME OF COURSE IS TRUE FOR THE FUISZ'S.

21 MR. BOIES: THANK YOU, YOUR HONOR.

22 THE COURT: OKAY. ANY OTHER QUESTIONS?

23 IF NOT, I WISH YOU A GOOD EVENING AND I WILL SEE YOU BACK
24 HERE NEXT WEDNESDAY.

25 MR. UNDERHILL: THANK YOU, YOUR HONOR.

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MR. JOE FUISZ: THANK YOU, YOUR HONOR.

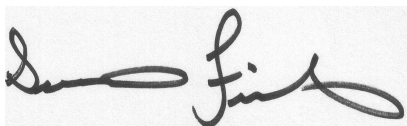
MR. BOIES: THANK YOU VERY MUCH YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 3/6/14